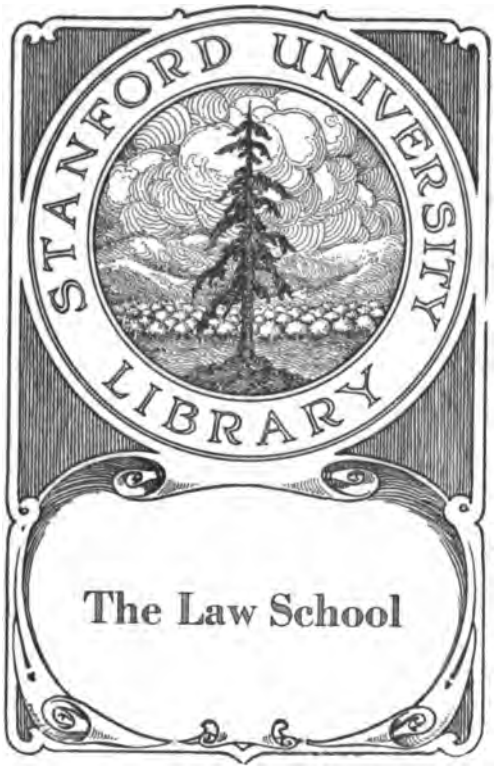
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REPORTS.

CASES DECIDED

From 1st JUNE, 1881, to 31st MAY, 1884;

WITH

A SUPPLEMENT:

CONTAINING THE CASES DECIDED DURING THE YEAR 1879.

EDITED BY H. MURRAY-PRIOR AND G. R. BYRNE, BARRISTERS-AT-LAW.

THE JUDGMENTS REPORTED BY W. H. OSBORNE.

VOL. I.

BRISBANE:
WATSON, FERGUSON, & CO., QUEEN STREET.

1884.

TABLE OF THE CASES REPORTED.

SUPPLEMENT.

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FULL COURT.

May 10th.

REGINA *v.* CORVIE AND LESNINI.

Caption—Admissibility of Depositions—31 Vict., No. 13, sec. 65.

To make the depositions of a deceased person admissible as evidence, there is no necessity for a general caption. The requirements of the statute, 31 Vict., No. 13, sec. 65, may be shown to have been complied with, from the whole depositions.

THE facts of this case are briefly these:—

The prisoners, Corvie and Lesnini, were charged at Gympie in December, 1880, with an "attempt to murder" one Grisostolo. Grisostolo died in January, 1881, and the prisoners were tried at the Maryborough Circuit Court before Mr. Justice Pring in April last, for the murder. The principal evidence against the prisoners were the depositions of Grisostolo. At the trial, Corvie was defended by Tozer (solicitor), Lesnini, by Murray-Prior. At the request of Prior and Tozer, Mr. Justice Pring reserved a case for the decision of the Full Court. The depositions were objected to as inadmissible evidence, principally, because there was no proper caption within the statute.

The caption was in this form in each case:—

"Gympie, [25th] 30th December, 1880.
(Before J. Farrelly, J.P.)

Augustus Corvie, [Stephano Lesnini] charged with an attempt to murder one Celeste Grisostolo." It was proved at the trial that Grisostolo was dead—that each prisoner was charged before a justice of the peace with having attempted to murder Grisostolo—that the deceased Grisostolo on each occasion, gave his evidence before a justice of the peace in the presence of the accused—that the evidence was taken on oath and that each prisoner had opportunity of cross-examination. Mr. Justice Pring admitted the depositions against the prisoners, who were found guilty of manslaughter, subject to the opinion of the Full Court as to the admissibility of the evidence."

Attorney-General for the Crown.

Murray Prior argued for Lesnini—and cited Reg. *v.* Newton, 1 F. and F., 641; Reg. *v.* Galvin, 10 Cox. C.C., 198.

The court decided that the objections raised were not good in law; and that the depositions were rightly admitted. There is no necessity that the caption to depositions should be exactly similar to the form given under section 65, of 31 Vict., No. 13—provided it be substantially the same. The requirements of the statute may be shewn to have been complied with from the whole depositions, not merely from the caption. Though thus there is no necessity for a general caption, still it is desirable that the forms given by the statute should be complied with. That taking the depositions from beginning to end, the statute has been complied with.

Judgment affirmed against both prisoners.

Solicitor: *F. I. Power*, Gympie.

EX PARTE MILLS. IN RE MILLS.

Mandamus.—Gold Fields Act of 1874.

The duties of a warden as to receiving, recording, and reporting, on applications under the Gold-fields Act of 1874, are simply ministerial, and therefore a writ of mandamus will lie to compel the warden to perform such duties.

ON, or about the 25th day of April, 1881, on the application of Thomas Mills, a miner, residing at Charters Towers, through his solicitor, Mr. Marsland, Mr. Justice Harding granted a rule *nisi*, calling upon Philip Frederick Selheim, the warden of the gold-field of Charters Towers, to appear before the Full Court on May 10th, 1881, and shew cause why he refused to receive—and why a writ of mandamus should not issue, ordering and commanding the said warden, or other warden for the time being of the said gold-field, to receive the application for a gold mining lease, which was made and tendered by the said Thomas Mills to William Skelton Charters, the then warden at Charters Towers, on or about the 2nd June, 1880, and by him refused, and to record and report upon the said application in the manner prescribed by the Gold-fields Act of 1874, and the regulations thereunder.

Garrick, Q.C., and *Real*, now moved the rule absolute.

Cooper (Attorney-General), for the warden submitted to any order the court might make.

The application for the writ of mandamus, was made on the following grounds:—

1. That the said Thomas Mills had, on the 2nd June, 1880, and has ever since continued to have, and now has a legal right to have his said application for a gold mining lease received, recorded, and reported upon, and otherwise dealt with in the manner prescribed by the said Act, and the regulations established thereunder.

2. That the said W. S. Charters, as such warden as aforesaid, was bound and required by the said Act and regulations, to receive, record, and report, and otherwise proceed upon the same application in the manner thereby described.

3. That the said P. F. Selheim, as such warden aforesaid, and as the successor of the said W. S. Charters, in the office of warden, of the said gold-field, was bound and required by the said Act and the regulations thereunder, to receive, and record, and report, and otherwise proceed upon the said application in the manner thereby prescribed.

Garrick, Q.C., for applicant, relied on secs 5, 10-15, 29 and 97 of the Gold-fields Act of 1874, and rules 77, 78, 79, 81 of the general regulations thereunder, and argued that the warden was bound to receive the application, on the ground that the receiving of such an application was a duty to the public; and in support of his case he cited The Queen *v.* the Mayor and Assessors of Monmouth, L.R., 5 Q.B. 251: the Mayor, and Assessors of Rochester, *in re* parish of St. Nicholas *v.* the Queen, 27 L.J., Q.B., 434. Davenport's case 1867, was commented upon.

The following judgments were delivered:—

LILLEY, C.J.:—

The 5th section of the statute enacts that "the Governor in Council shall have power to appoint all officers necessary to carry into effect the provisions of this Act, and assign to such officers, such duties and remuneration as he may think proper." That would no doubt give the Governor power to appoint wardens; by the 29th section a further power is given to the Governor in Council to appoint officers to be called wardens, who shall have and exercise the jurisdiction conferred upon them therein, or by the regulations. That seems to me to apply more particularly to the administration of justice, for in the 30th section, the extent of their jurisdiction is defined. The 29th and subsequent sections relate to judicial matters; but there is nothing in the Act which would make a regulation imposing other duties upon wardens inconsistent with the terms of the statute. The Governor might assign under section 5, certain ministerial duties in addition to the judicial duties committed to them. There is nothing in the statute that I am aware of which relates to the mode of applying for land; that is provided for by regulation. The 97th section enables the Governor "from time to time," to make such regulations, not being contrary to the provisions of this Act, as may be necessary for the purpose of giving effect to this Act, and for the management of the gold-fields generally. I have already said it would not be contrary to the provisions of this Act, to assign to the wardens ministerial, as well as judicial duties, "such regulations shall be published in the *Gazette*, and after publication therein, shall have the force and effect of law, and shall be judicially noticed in any court of justice." The meaning of that portion of the section giving a regulation the force of law is to make any regulation by which the Governor assigned any duty to a warden or other officer a continuation of the statute. The Governor passes them, and they are laid before parliament in the manner prescribed by the statute. Regulations were made, and by the 77th, 78th, and 79th regulations provision is made for the mode of applying for auriferous leases. It is not necessary to enter into the details of the regulations. The evidence here is, that Mills, the applicant, upon whose behalf the rule was obtained, had complied with all the requisites—had done everything in fact which the law obliged him

to do to obtain the status of applicant under the regulations. The law then throws upon the warden certain duties, by regulation 77, to receive the application, by 78, to record it, and by 79, to report upon it. To my mind the regulation does not confer any discretion upon the warden, and that with respect to the recording and reporting upon the application, it does not charge him with any judicial duty. They are simply ministerial duties. He might report what he liked; it is in fact analogous to a writ commanding a magistrate to hear and determine, but which does not charge him to hear and determine in any particular way. Here the warden had a duty imposed upon him, and the court could command him to receive, record, and report upon the application; but they could not of course, tell him to report in any particular way. It seems to me that there is nothing in the statute or the law relating to mandamus in connection with the Crown prerogative which deprives the applicant of his right to a writ of mandamus. There is a statutory duty thrown upon the warden, and there is no other satisfactory remedy. The case of Davenport, we may presume, was rightly decided on the existing law, but it can have no application to this case. All that was decided was that the commissioner was the proper person to go to,—that the land agent was not the proper officer. If the case has any application at all, it is rather in favor of the writ the court now grants. But in this case there is an officer almost in the position of the commissioner under the Land Act of 1868. There is no other person between him and the Crown, and there is no other way of reaching the person who has to decide upon the application, unless the warden receives, records, and reports upon it.

The writ must go, but without costs.

HARDING, J.:—I have also arrived at the same conclusion. The case which raised a doubt during the argument was the case of Davenport, which had been mentioned. Of course the decisions of this court from time to time are binding upon the court, and if it had been found on argument that the points raised in the case now before the court had been already decided by Davenport's case, it would have been bound by it. The decision in that case turned upon the principle urged in the argument against the rule, that the court could not grant a mandamus against a person who, as an inferior ministerial officer, obeyed a power which he was unable to resist. As far as I have been able to criticise the Act and the rules now under consideration, I have been unable to find that that objection held in the present case, therefore, I do not find myself bound by Davenport's case. The difficulty caused by that case being removed, I consider the construction of the Gold-fields Act and regulations clear. The Act and regulations taken together form the law of the land, *quâ* the gold-fields and country subjected to it. The proposition with which Mr. Garrick started, "that the warden was bound to receive, record, and report upon the application," is to my mind clearly made out by the 77th, 78th, and 79th regulations, assisted more particularly by illustrations derivable from regulations 81, 84, and 85. I am of opinion that the rule—which is a rule of universal application—that in the absence of any other adequate and specific legal remedy, mandamus will lie to compel the performance of purely ministerial duties plainly incumbent upon an officer by operation of law, or by virtue of his office, and concerning which he possesses no discretionary powers—is applicable to the present case. I myself see no other adequate and specific remedy possible. The neglect of the officer to receive, record, and report upon this application might be a disobedience of a statute, and if it were so would, as laid down in the 124th article of "Stephens' Digest of the Criminal Law," amount to a misdemeanour, in respect of which the warden might be indicted. But if he were indicted, found guilty, and punished, it would be more a remedy belonging to the state for his correction than for the injury to the applicant. And as that is the only other remedy which, as far as I am aware, is open to the applicant, and which to my mind is not an adequate one, I am of opinion that the ordinary law as administered by this court in respect

to writs of mandamus, must be followed—and the rule made absolute.

PRING, J.:—The first question to be determined appears to me to be, whether a writ of mandamus will lie against a warden under the "Gold-fields Act," for non-compliance with its terms. The 5th section is the first which gives the general power to the Governor in Council to appoint officers necessary to carry out the provisions of the Act; and on looking at the 29th section, it will probably be apparent that the warden, mentioned in the 78th regulation, is fully clothed with statutory power, by virtue of the latter part of that section. By the 10th section, the Governor has power to grant leases for mining, but nothing is said in that section as to the terms upon which he may grant them, and I suppose it was thought necessary that the *modus operandi* should be defined by regulation. Regulation 78 defines the warden's duty in respect to applications for leases; he is to record each application in a book. There is no discretionary power in him to refuse to do what is appointed by the regulations, which, after publication in the *Gazette*, have the force of law, and become statutory enactments. I am therefore of opinion, that the warden is clothed with a statutory duty defined by the statute, and one which he has no option to decline to perform, and no discretion.

Rule absolute, but without costs.

Solicitors for applicant, *Edwards & Marsland.*

NEVILLE v. ORBELL.

District Courts Act, 1867, section 113—Licensed Pawnbrokers Act, 13 Vict., No. 37.

On the trial of an information laid under the Licensed Pawnbrokers Act, 13 Vict., No. 37, it is a question of fact to be decided on the whole evidence by the justices, whether there has been a carrying on of the business of a pawnbroker under section 2 of such Act. The receipt of interest on a pledge is *primâ facie* evidence of carrying on the business, which, however, may be rebutted by evidence from the person charged. For purposes of prosecution, the offence may be held to have been committed on date of receipt of interest.

THIS was a special case stated under "31 Vict., No. 30, sec. 113. An information was laid under the Pawnbrokers Act. The information was tried before justices, when there was given as evidence, that one Barber lent Neville £1 11s., for principal and interest on the loan of £1, lent on a watch some 13 months previously. Neville had no license. Neville was fined. He appealed, and the District Court Judge (Blake) upheld the conviction, reserving this question for the Full Court:—

"Was I right in deciding that the receiving of interest by the appellant, was the carrying on of the trade or business of a pawnbroker, within the meaning of the second section of the Act, 13 Vict., No. 37."

Real appeared for the appellant, and argued the case at length.

LILLEY, C.J., said that:—

Upon the evidence set out in the third paragraph it appeared that the appellant had advanced £1 upon a watch pawned with him by one Barber; that the loan was to bear interest. It did not appear that any interest was paid in the meantime, but thirteen months after, the person who pledged the watch paid the principal, and eleven shillings in respect of interest. Upon that evidence the judge held, that the receiving of interest by the appellant from the person who pledged the watch on the 13th January, 1881, as set forth in the evidence, was a carrying on of the trade or business of a pawnbroker. What is the ordinary conception of the business of a pawnbroker? He receives a chattel which is said to be pawned with him, which bears in respect of the original loan, from day to day, an accumulation of interest; every day that the pawnbroker forbears to demand and recover his money, he has the expectation of the loan bearing additional interest. The forbearance is in fact in the nature of a new advance, and that being so, every day he permitted the pledge to remain unredeemed, was a new carrying on in respect of that particular article of the business of a pawnbroker. He was holding the article in expectation of gain or reward. Until the article was discharged, it seemed to him there was a carrying on of the business of a

pawnbroker. That seemed the question the judge had submitted to them—not whether the naked receipt of interest would constitute a pawnbroker. He might have put the question thus:—Do these facts constrain me as a necessary conclusion of law, to hold that there was not a carrying on of the business, &c.? He thought the judge was right in holding that it was open to him to deal with the facts, and that there was no necessary conclusion of law. Whether, when only a single instance was proved, the judge was right in coming to the conclusion, that there was a carrying on of the business, was not for them to decide. He thought there was *primâ facie* evidence which demanded from the party charged, that he should rebut it, which he had not done. He was of opinion, therefore, that the appeal must be dismissed.

HARDING AND PRING, JJ., were of the same opinion.

Appeal dismissed.

Solicitors, *Rees R. Jones and Brown.*

IN INSOLVENCY.

April 14.

(Before his Honor Mr. Justice Harding.)

IN THE ESTATE OF GEORGE NASH, OF IPSWICH, CARPENTER.

Release of Trustee—Practice.

THIS was an application made by N. Wilson (of Wilson and Wilson) on behalf of the trustee of the property of this insolvent, for his release.

HIS HONOR delivered judgment, and stated that the law makes, amongst others, the following requirements:—1. That the trustee shall apply to the court to fix the time and place upon which he may make application to the court for such release (rule 105). 2. That a meeting of the creditors should be called to consider the application, the time and place when the application will be made being inserted in the summons. The trustee to give information at this meeting that he proposes to apply to the court for a release, and lay before the creditors thereat "an account, showing the manner in which the insolvency has been conducted, with a list of the unclaimed dividends, if any, and of the property, if any, outstanding (Insolvency Act, s. 197), and produce a report made by the accountant in insolvency on his accounts" (rules 106, 183), and that any creditor shall be at liberty at this meeting to express his opinion as to the conduct of the trustee (s. 197), and that the chairman thereof shall cause minutes of all the resolutions and proceedings to be kept and duly entered in a book from time to time, to be duly filed in court, and that such minutes, if purporting to be signed by him, or a certified copy thereof, shall be receivable as *primâ facie* evidence that the meeting was duly held, and the resolutions or proceedings were duly passed and had (s. 180). (See ss. 93 and 128 as to meetings of creditors.)

3. That the trustee shall, fourteen days before his application to the court for a release, transmit to the accountant in insolvency a copy of his before-mentioned accounts, and that thereupon and upon such other matters as he may think ought to be so reported, the accountant in insolvency shall make and present to the court a report (s. 197).

4. That the trustee shall, at the application for his release, produce to the court the report of the accountant produced at the meeting (rule 183). There is also provided in form No. 26, in the schedule of forms, the form of the list of creditors assembled, to be used at every meeting.

Such being the requirements of the law, the judge should have before him at the time of the making of an application for a release by a trustee, the following documents, the originals, or properly authenticated copies of which should be on the file of the court:—1. The order fixing the time and place for the application. 2. The minutes of the meeting, or a certified copy thereof. 3. The trustee's account placed before the meeting. 4. The accountant's report produced at the meeting on the trustee's accounts. 5. The list of creditors assembled at the meeting. 6. The accountant's report on the trustee's account, &c., to the court. The minutes should be drawn up in a formal manner (see forms 25 and 32), showing

compliance by the trustee with his duties in respect to the meeting, the resolutions passed, and proceedings had thereat.

The trustee's account should be something more than a mere debtor and creditor account. It must show how the insolvency has been conducted, so as to enable the creditors, who for the purpose may be assumed to be ignorant of the matters affecting the estate, to arrive at conclusions, among other things, as to what the estate consisted of at the time of the adjudication in actual and doubtful assets, the manner of the distribution of the proceeds, and generally the economy or otherwise of the winding-up of the estate, and the trustee's performance of his duties in respect thereof. Probably the word 'account,' as used in this section, means a narration of the mode in which the winding-up of the estate has been conducted by the trustee.

The accountant's report should also be formal, according to the form and sections of the Insolvency Act, which he specified. Forms 27, 39, and 42—the last is most suitable,—also the reports to be produced to the meeting, should have special reference to the provisions of s. 136, ss. 192 to 196. Rules 172 to 186; Rules 17th August, '77; rules 7, 8, and 9;—and generally as to his accounts as known to the accountant. The report on the trustee's account should deal with that account in respect to its fairness, completeness, and general accuracy, as weighed (1) by its contents, (2) by the accountant's knowledge of the estate.

His Honor said he had not referred to the technical proofs of services of notice, advertisements, &c., still excluding them. He said, that of the six documents required, he found only the first of them, viz., the order fixing the time and place for this application, dated 2nd March, in regular form. In the place of the residue he was referred to an affidavit of the trustee, filed on 8th April, having three annexures thereto. The first, marked A, is said by the trustee in his affidavit to be a report on his accounts obtained by him from the accountant; the next, B, the minutes of the meeting; and the last, marked C, to be the report of the accountant on the trustee's accounts laid before the meeting. The documents marked A and C, entirely lack the form of reports. The first is in the shape of a letter from the accountant to the trustee, and concludes with an expression of regret that no dividend had been declared. If the other document in the form of a letter is intended for the 6th of the documents, it should, at all events have been presented by the accountant to the court and not delivered to the trustee. The document marked C merely contains a resolution to the effect that the creditors voting approve of the trustee's application; whether it was properly passed or not no means of ascertaining is afforded, as it does not say who was present; and the fifth document he had mentioned does not appear to be on the file. The third document he had mentioned, the trustee s account placed before the meeting, is entirely wanting, so that out of six documents required, two (3 and 5) are absolutely wanting; and three others (2, 4, and 6), the one imperfect, and the other most informal. Possibly it may be in the power of the applicant to supplement the material before him. With this object he would further reserve judgment on this application till the 18th of May, with leave to the trustee to supplement the materials in the meantime as he may be advised. If he could not do so he would refuse the application and permit it to be made *de novo*.

On the 18th of May, on the application of N. Wilson with further documents and materials, His Honor being fully satisfied, accordingly granted the application for the release of the trustee.

IN CHAMBERS. April 20.

(Before his Honor the Chief Justice.)

IN THE INSOLVENT ESTATE OF GEORGE AITKIN.

H. SMITH (Smith and Smith) appeared in support of a note of motion to fix a day for the insolvent to attend and pass his last examination. Macpherson, on behalf of the official trustee and some of the creditors of the insolvent, opposed the application on the grounds—1st. That the first meeting of the creditors had not taken place. 2nd. That there had been no opportunity to

examine the insolvent. And 3rd. That no books of account showing the business transactions of the insolvent had been delivered to the trustee.

The insolvent in this case had been arrested under a *Ca. Re.* An order for discharge from custody was made upon finding bail, the insolvent in £500 and two sureties in £250 each, until the insolvent passed his last examination.

His HONOR, considering the circumstances of the case, dismissed the motion.

April 26th.

(Before His Honor the Chief Justice.)

IN THE INSOLVENT ESTATE OF EDWARD RUSSELL DAUNT, FORMERLY OF BRISBANE, NOW OF SYDNEY, LIFE INSURANCE AGENT.

Insolvency Act 1874, sec. 168.

WEDNESDAY, the 20th April, had been fixed by the Registrar for the insolvent to apply for his certificate of discharge. Upon the case being called on, neither the insolvent nor the solicitor appeared in support of the application.

The creditors' trustee appeared.

His Honor, after reading the trustee's report, reserved judgment.

On the 26th April, His Honor delivered the following judgment:—

The insolvent having passed his last examination, and two years having elapsed from the date of adjudication, he filed an application for his certificate in the form No. 53 prescribed by the rules. The Registrar appointed a time and place for hearing the application, and the required notice was gazetted and given to the trustee by the insolvent, in accordance with rule 121. A sitting of the court has been held pursuant to the Registrar's appointment. The trustee appeared and rendered his report. The insolvent did not appear, nor any one on his behalf. The question for me to determine is whether, under such circumstances, I can deal with the application for the certificate. The procedure in this instance is under section 168 of the Act, and the court has decided that the insolvent must, under that section, prove some one of the statutory conditions entitling an insolvent to a certificate of discharge. The burden of proof is on the insolvent, and if he, after having applied to the court for such certificate, does not produce satisfactory evidence, the statute provides that "such certificate shall not be given." Under the English law the court must on its own motion appoint a sitting to consider a question of granting an order of discharge to the bankrupt. Under our statute the insolvent gives the court jurisdiction by applying for a certificate of discharge. He does so by filing his application on the records of the court, and the time and place of hearing having been fixed by the registrar, the judge attends in court, ready to receive the evidence and to hear the application which is read (form No. 54). The insolvent has then an opportunity of satisfying the court that "he is entitled to such certificate." If he fail to appear or having appeared does not prove to the court that he is so entitled, the matter may be adjudicated upon. The insolvent cannot, in my opinion, without the leave of the court, withdraw his application. When the insolvent has applied to the court he cannot evade its judgment. In this case the insolvent and his solicitors absented themselves, and failed to give any evidence or to support the application in any way; they did not even apply for another opportunity of doing so. The reason is clear. The report of Mr. Pocock (the creditors' trustee) shows that the books of the insolvent have been most irregularly kept; that they do not disclose a true state of his affairs, the cash book being only partially kept, and no entries whatever made in the ledger between 1st October and the date of insolvency, 27th November; that the insolvent stated the causes of his insolvency as follow: "Great depression in trade, heavy failures in Brisbane, entailing large losses through having to take up so many dishonoured bills and cheques, the absconding of his partner, G. A. Syme, who drew large amounts from the bank for his own private use, and also giving bills and cheques without receiving any consideration, and which bills and cheques are now coming in as claims in the estate." The trustee further reports upon these statements that they are not borne out by

facts, so far as he has been able to discover; that the debts proved amount to £1,214 8s. 9d.; that the total amount of debts, good and bad, owing to the insolvent did not exceed £300; that all the assets have been realised; and that a dividend of only 8d. in the £ has been paid, in all about £40 worth of assets. The insolvent had stated, as we shall see, that his assets were worth £1,600. The insolvent's statements respecting his partner (Mr. Syme) appear to be impudent falsehoods. The trustee reports upon these statements as follows:—"His partner (G. A. Syme) appears to have been a heavy loser by his connection with Daunt. They entered into partnership in June, Syme putting £500 in cash into the concern. In the following October they dissolved partnership, Daunt continuing the business on his sole account. The bank book of the firm disproves the assertion that Syme drew large amounts for his private use. I have received no claims on account of cheques and bills given by Syme as stated. The report of the trustee also shows that the insolvent Daunt endeavoured just fifteen days before he was adjudicated insolvent to obtain pecuniary assistance from Mr. C. O. Clements, to enable him to effect a compromise with his creditors, by representing that his assets, alleged by him to be worth £1,600, exceeded his liabilities by £276 16s. 6d. Had Mr. Clements been deceived he would have lost probably the whole amount of the composition. So far from the insolvent being entitled to his certificate he appears to be a person who ought not to receive the sanction of the court to trade or pretend to trade again in this community. The certificate is refused.

MATRIMONIAL CAUSES JURISDICTION.

April 22.

Before the Judge Ordinary (the Chief Justice).

REED *v.* REED.

WHITE AND LUBIN, CO-RESPONDENTS.

Copy of the petition must be served upon the Attorney-General at the time such petition is served upon the respondent and co-respondent.

MR. CANSDELL, for the petitioner.

The petitioner proved service of petition and citation upon respondent and co-respondent Lubin.

Mr. Cansdell informed his Honor that the Atorney-General had not been served with a copy of the petition until the 13th April, although the petition was filed on the 15th February, but contended that the words of the statute requiring the service of the petition on the Attorney-General on the same day as the petition is filed are only declaratory; that the service had been made sufficiently long before the hearing to enable the Attorney-General to intervene if he thought proper.

His Honor said he had no power to waive the statute after such a long period and doubted, even if the petition had been served one day after, whether he had the power to waive it, as he considered that looking at the words of the section "Every person presenting a petition for dissolution of marriage shall on the day of presenting the same deliver a copy thereof to the Attorney General, &c.," the allowing of such a service as this might defeat the whole purpose of the section which had a great public object in view, viz., "the securing of the intervention of the Attorney-General, if he believed he had grounds, and allowing him time to make enquires." If such service were to be held sufficient, parties might delay the service of the copy of the petition upon the Attorney-General until the eve of the hearing and in the meantime evidence upon which the Attorney-General might have acted might possibly have disappeared.

His Honor gave leave to re-file the petition, and to allege supplemental matter if so advised, to re-serve and to proceed *de novo*.

Solicitors, *Smith and Smith*.

IN CHAMBERS.

April 29th.

A. J. S. BANK *v.* SALSBURY.—ORDER XIV, RULE 1A.

The facts of this case appear in the judgment. Mr. Justice Harding delivered judgment as follows:—THIS was an application made by Mr. Rüthning (of the firm of Little, Brown, and Rüthning), on behalf of the plaintiffs, the A.J.S. Bank, for liberty under order XIV, rule 1A, of the Judicature Act, to sign final judgment in this action for

the amount endorsed on the writ—that is to say, £5,432 11s. 4d. for principal, and £1,585 1s. 5d. for interest, making together £7,008 12s. 9d.—with interest and costs, and the costs of this application.

This application was opposed by Mr. Hellicar, of the firm of Daly and Hellicar, on behalf of the defendant. His arguments are substantially comprised within the four following grounds:—(1) That the affidavit of Mr. Robartson read by the plaintiff in support of this application, and which formed its foundation, was not an affidavit made by a person who could swear positively to the debt or cause of action verifying the cause of action, as is required by order XIV, rule 1A. (2) That the plaintiff was a mortgagee in possession who had not realised his security, and was consequently not entitled to the benefit of that rule. (3) That the defendant had matters of counter-claim against the plaintiff in respect of his seizing property of the defendant not included in the mortgage, and of other matters. (4) That the subject matter of the action was matter of account; and that it was not shown on the affidavits that in the result of the taking of the accounts between the plaintiffs and the defendants there would be found to be a balance in favour of the plaintiffs at this period of the action specified or ascertainable. I am not driven to decide the application on the first ground only. Had I been I think I should have found it tenable, as Mr. Robartson speaks in his affidavit of matters which took place during a period of at least eight years before he shows any means of personal knowledge of the same; his entire knowledge of such matters appears to be derived from the plaintiff's books, which were not during that period kept by him or under his direction.

As I have already stated, this is an application for leave to sign final judgment under order XIV, rule 1A, a provision by which the court, in the exercise of its functions of debts collector, is materially assisted when there is really no defence to the plaintiff's demand, for it often saves the expense attending the formality of a trial, at which the defendant might not appear, and it often prevents delay by enabling the plaintiff within a few days after the defendant's appearance, in a proper case, verified by affidavits, to obtain an order empowering him to sign judgment for the whole or such part of his claim as the judge refuses the defendant leave to defend the action in respect of. This order (XIV) provides for three cases, the respective judgments for which will be found in Form H, 4, 5, 6, and 7, in the schedule to the 'Rules of the Supreme Court.' The three cases so provided for are—(1) that which entitles the plaintiff to leave to sign judgment for the amount of his claim in a summary manner; (2) that which entitles the defendant to leave to defend the action without the imposition of terms; (3) that which entitles the defendant to leave to defend the action subject to the imposition of terms. I propose to consider these cases in their order. The English courts, on the corresponding order coming into force in England by virtue of the English Judicature Act, at once felt that the remedy afforded by the order was one of a special character, and held that it should only be given according to its very letter *(10, W.N., 230)*; accordingly they have held that the plaintiff, in order to bring himself within the first case, must show a case perfectly clear, upon which, if there is any doubt, he ought not to be allowed to avail himself of a process so summary in its nature as to deprive a defendant of what is *primâ facie* every subject's right *(4, Ex D., 282; 5, App. Cas., 695)*, namely, the right to defend an action brought against him. It was also said that the judge should not pretend to try the action on an application under this order—that all that he is required to do is to ascertain whether there is a *bonâ fide* defence to the action or not. *(Andrews v. Stuart, 11 W.N., 7.)* Amongst others, the following are examples of circumstances which have been held to bring the plaintiff's application within the first case, the plaintiff in every case pledging his belief that there is no defence to the action—where it is shown from the acknowledgment of the debt by the defendant, or

from other circumstances, that the defence would be for mere purposes of delay *(Lloyd's Banking Company v. Ogle, 1 Ex. D, 262, 45 L.J., C.L. 606)*—where it must be assumed from the circumstance that the defendant files no affidavit that there is no substantial defence to the action *(11 W.N. 12)*—where the plaintiff's case is clear *(East Assam Company v. Roche, 10 W.N., 238)*. To entitle the defendant to the benefit of the provisions of the second case he must, in showing cause against an application under this order, show that he has a good defence on the merits *(Ray v. Barker, 4 Ex. D., 279)*. The following are examples of cases in which the defendant has been held to have brought himself within this benefit. The case of a surety where the debt had not been acknowledged by the principal, and where the defendant had not been furnished with particulars, and had not admitted his liability *(Lloyd's Banking Company v. Ogle, 1 Ex. D., 262)*—where the defendant showed that he had a counter-claim to an equal or greater amount than the plaintiff's claim *(1 Charley's P.C. 45, Hickson v. Morrison*, before me, March 26th and 28th, 1881)—where the defendant, sued on a bill of exchange, denied the consideration and there was considerable contradiction about the matter *(11, W.N., 64)*—where the defendant set up a release *(Berridge v. Roberts, 11, W.N., 86)*—where the defendant in his affidavit goes beyond the mere statement that he has a good defence on the merits, and states what his defence is, and gives reasons for thinking that his defence is substantial, and will be sustained in evidence *(Runnacles v. Mesquita, 1 Q.B.D., 416; 45 L.J., C.L. 407)*—where the claim is for payment of sums of money, and the defendant sets up as a defence a denial and contradiction of the accounts on which the claim is founded; more especially has this been held to be the case where there are mortgages, and the creditor has been a mortgagee in possession *(Wallingford v. Mutual Society, 5 App. Cas. 685)*. The third class contains those cases in which the defendant, while failing to bring himself within the second class, yet discloses facts which may entitle him to defend *(Ray v. Barker, 4 Ex. D., 279)*; for example, where the action is by indorsees and holders for value of a bill of exchange against the acceptors, the defendant has been allowed to defend on payment of the amount into court *(German Bank of London v. Schmidt, 11 W.N., 10)*. But the defendant, if he makes no affidavit of merits, is not entitled as a matter of right to defend the action upon offering to bring the sum claimed into court; a discretion is vested in the judge to decide whether, upon considering the other facts of the case, the defendant's offer is a sufficient ground for refusing the plaintiff's application *(Crump v. Cavendish, 5 Ex. D. 211.)*

Having thus far reviewed the legal right and position of the parties to an action on the hearing of a summons for final judgment under this order, I proceed to consider the particular case now before me, and to express an opinion on each of the grounds of defence urged on behalf of the defendant by Mr. Hellicar. From what I have already said, it will be seen that I think the first ground of defence is proved in fact, and that it is good in law. The second ground of defence I do not take alone; did I do so, the inclination of my opinion is to the effect that it would be a good answer to this application *(Wallingford v. Mutual Society 5 App. Cas. 685)*; but, coupling it with the 4th, I think that the defendant has sufficiently sustained the facts, as therein alleged, for the purpose of an interlocutory application, and that he has brought his case within the second class of cases I have referred to, which entitle the defendant to leave to defend the action without the impositions of terms. *(Standard Discount Co. v. Etaud de la Grange, 3 C.P.D., 67)*. As to his third ground of defence, the defendant has only shown a right to counter-claim in respect of some matters, but he has not shown that it would have equalled or exceeded the amount of the plaintiff's claim; the other grounds being sufficient to decide the case, it is unnecessary to decide what benefit the defendant would have been entitled to in respect of this contention.

The facts of the case as I gather them from

the papers before me, and which I consider sufficient to sustain my decision, are as follows:—

The action is brought on covenants contained in a mortgage made by the defendant in favour of the plaintiffs so long ago as November, 1873, over certain stations, cattle, and stock, to secure the repayment of £2,500, and further advances and interest, at the rate of 10 per cent per annum, with half-yearly rests.

The amount of the alleged indebtedness of the defendant is attempted to be proved on behalf of the plaintiffs by the affidavit of Mr. Robartson, who says that he has examined the plaintiffs' books, showing the defendant's accounts with the plaintiffs; that an account annexed to his affidavit is a correct account, made up by him from those books of the defendant's indebtedness to the plaintiffs under the mortgage: that from his position as manager of the Rockhampton branch of the plaintiffs' bank, he positively states that the defendant is indebted to the plaintiffs in the balance shown in the said account, and that the moneys shown in the said account as having been received from the defendant are the only moneys which have ever been received by the plaintiffs from the defendant; that the moneys shown in the said account as having been paid by the plaintiffs for the defendant have been so paid; that the bank pass-book was from time to time made up and handed to the defendant; that the last occasion upon which it was handed to the defendant was on the 15th of March, 1881; and that the defendant never made any objection to any of the entries therein.

The defendant had little time to cavil with the last account, the writ was issued on the 23rd of that month of March. Mr. Robartson became the plaintiffs' manager at Rockhampton since August last, where he had not previously been an officer of the plaintiffs. The account with respect to which he speaks with such positiveness, extends in date from the 10th of May, 1872, to the 10th of March, 1881, and covers twenty-nine sheets of paper. After June, 1878, this account contains no entry for interest until the last six items are reached which follow the end of the regular account, the last item of which is dated 10th March, 1881, and are for the six monthly amounts of interest alleged to be due after June, 1878. The defendant says that by an agreement made by him with Mr. Taylor, the plaintiffs' previous manager at Rockhampton, the plaintiffs were not thereafter to charge the defendant interest on his account. The defendant further says that credits amounting in one instance to over £700 do not appear in the pass-book, and that other items appear on the debit side of which he knows nothing; that the plaintiffs have not credited him with twenty-six bales of wool received by the plaintiffs.

The defendant further states that the plaintiffs have taken possession of the premises secured by the mortgage, and also stations of his not included therein: and that the runs, stations, and cattle now held by the plaintiffs under the mortgage, if judiciously realised, will satisfy the plaintiffs' claim. I have passed over the statement made by the defendant in the third paragraph of his affidavit, my attention was not called to it during the argument. It is indefinite in the extreme, and I assume, was considered of no importance, as no allusion was made to it when I asked if there were any sums admitted which would be lower than that which would be found due by the defendant to the plaintiffs on taking the accounts, and it was said to be impossible to fix any such sum.

There will be liberty to the defendant to defend and counterclaim (H. 5), costs of both parties of this application to be costs in the cause.

HARDING, J. May 5th, 1881.

In re JOHN HOPE, OF ADELAIDE, SOUTH AUSTRALIA.

Executors—Testator—Foreign Domicile—Ancillary Letters of Probate.

THE Registrar of the Supreme Court raised an objection as to his granting as a matter of course ancillary letters of probate to executors (domiciled out of the jurisdiction of this court) of a testator who also died outside the jurisdiction.

Thus, Mr. Noel applies on behalf of the executors (resident in Adelaide, South Australia) of the will of John Hope, domiciled in Adelaide at the time of his death, that probate of the will may be granted to the said executors.

In support of this application Mr. Noel cited:—*In the goods of Felix Clarke, 36 L.J. P. & M. 72; In the goods of Earl, L.R. 1 P. & D. 450; In the goods of Richardson, L.R. 2 P. & D. 244; Hood v. Barrington, L.R. 6 Eq. Ca. 218; L.R. 1 P. & D. 288; Enohin v. Wylie, 10 H.L. pp. 1, 15 and 19; Lyon and Warrington v. Balfour, 2 Adams Rep. Eccl. 501; In the goods of Sampson, L.R. 3 P. & D. 49; Williams' Executors and Administrators, 370, 7th edition; In the goods of Read, 1 Hagg. Ecc. Rep. 474; In the goods of D. F. De Angulo Urruella, L.R. 1 P. & D. 598, 28 L.J., N.S. 21.*

His Honor said, that in granting an order in this case he should not make a precedent, because the granting of the order turns on the particular circumstances of this case. Before Separation, it was laid down in N. S. Wales, that the proper course in such a case was to grant letters of administration with the will annexed *(Stephen's practice of N. S. W. 318)*; this was decided on the old Charter of Justice. This case, however, was made on a law then in force in N.S.W., which has now become obsolete. Considering the 8th section of the *Probate Act*, he would follow the English decisions and practice, and undoubtedly there was power in the court to grant such a probate. The executors were not entitled as a matter of right to have probate granted to them, as if they were executors of a testator who died within the colony, and were also themselves resident within the colony at the time of application. There was a discretion in the court to refuse probate, if from the circumstances of the case they thought fit, under section 32 of the *Probate Act*—which is the same as 21 and 22 Victoria, c. 77, sec. 73, of the English statutes. In this case the executors reside in South Australia, a country whose Supreme Court exercises its jurisdiction at a great distance from this country, and to make creditors resort to the former, would be practically to deprive them of their remedy. Such a ground might be sufficient for the court to exercise its discretion in refusing probate and granting letters of administration with the will annexed. In this case there are no creditors in the colony who would be forced to seek their remedy in a distant court, and therefore, in this case, this reason for refusing probate does not exist. The tendency of late years has been to so limit grants of probate, that persons resident within the jurisdiction of the court should be enabled to seek their remedy in the court, and not in a foreign court. Another reason in favour of granting letters of administration with the will annexed, in preference to the grant of probate, was, that in the former case, a bond for the due administration of the estate would have to be given; but where all creditors have been paid, it was not unusual for the court to dispense with the sureties to the bond, and to allow administration to go upon the bond being executed by the administrator alone, although he be resident beyond the colony. Under these circumstances, in this case, nothing would be gained by taking the bond of the executors resident beyond the colony, because no better remedy could be obtained under the bond, than against them personally. Therefore, probate may go to the executors applying as aforesaid.

Solicitors, *Hart and Flower.*

MARYBOROUGH CIRCUIT COURT.

PRING, J. April 28th, 1881.

IN the case of R. *v.* Kennedy and Royston, where Kennedy, who was first on the information was undefended, and Royston was defended by counsel, his Honor held that it was the practice of this colony, if no witnesses were called for the defence of either prisoner, that the undefended prisoner (in this case Kennedy), being first on the information, had the right of first addressing the court and jury.

FULL COURT.

June 7th.

In re JAMES FRANCIS FITZGERALD, AN ARTICLED CLERK.

Power, on behalf of Mr. Fitzgerald, and also as a member of the Board of Examiners for Solicitors, applied for the direction of the Court under the following circumstances :—

Mr. Fitzgerald had been articled to the late Mr. W. E. Murphy, and, with the exception of forty-five days, had served the full time required by the Rules of Court for the admission of solicitors, &c.—viz., five years. In consequence of Mr. Murphy's death, Mr. Fitzgerald would, in order to serve the remainder of his time, be required to enter into fresh articles, and to pay for a second time the fees relating thereto.

Power suggested that the court would allow Mr. Murphy's executors to make an assignment of the articles to Mr. Paterson, partner to the late Mr. Murphy, and thereby relieve the articled clerk from the expense of entering into fresh articles.

LILLEY, C.J., said that it was a clear principle of law that "as regards mere rules of court" the court could mould them to met the equity of the case, but it could not give relief from anything required to be performed under a statute. In this case an order would be made for the assignment by the executors to Mr. Paterson, the examiners to satisfy themselves as to service between Mr. Murphy's death and assignment.

MATRIMONIAL CAUSES JURISDICTION.

Lilley, C.J. (Judge Ordinary).
April 28th, May 2nd, 3rd and 9th.

GOSSETT *v.* GOSSETT, THOMAS AND SCHEFFLER.

Costs.

Thompson for petitioner. *Real* for respondent Emma Florence Gossett. *Sheridan* for co-respondent George Thomas. Scheffler did not enter an appearance to the citation.

This was a petition by the husband praying for a dissolution of marriage on the grounds of the wife's adultery with the co-respondents, and also with a man unknown. The evidence on behalf of the petitioner was taken upon commission at Rockhampton, and set out several acts of adultery with both the co-respondents, alleged to have been witnessed by persons in the employ of the petitioner.

The respondent and co-respondent Thomas were examined and denied all the alleged acts.

His Honor took time to consider his decision, and on 9th May gave judgment, and found as to respondent Mrs. Gosset—that she had committed adultery with the co-respondent Thomas, but not with co-respondent Scheffler or unknown man.

As to co-respondent George Thomas that he had committed adultery with respondent, and that he pay the petitioner's costs, including the costs paid by petitioner to his wife's solicitor for her defence but excluding the costs relative to the averment of adultery against Scheffler and unknown man. As to co-respondent Scheffler and as to the unknown man, His Honor dismissed the petition without costs.

Decree *nisi* to be moved absolute at the expiration of six calendar months.

Solicitors, *Daly and Helicar, Agents for Melbourne* of Rockhampton, for petitioner. *Chambers* for respondent and co-respondent.

May 23rd and 26th.

EWING *v.* EWING.

Where the jurisdiction of the Court fails for want of proof of the original cause of judicial separation, there is no residuary or collateral jurisdiction to deal either with the question of alimony or of the custody of the children.

PETITION by Isabella Ewing for a judicial separation from her husband, William Henry Ewing, on the ground of cruelty and indecent behaviour.

Rutledge for petitioner.

Power for respondent.

At the close of the evidence, His Honor stated that he was of opinion that the allegations of cruelty had not been proved. His Honor then

asked counsel what they contended would be the rights of the parties in the event of his finding certain things upon the evidence before him.

In answer to the question, *Rutledge* stated that in the event of His Honor finding, as he had done, that there was no cruelty on the part of the respondent, the petition of course would be dismissed, or retained only for the purpose of dealing with the custody of the children and alimony. If His Honor found that the petitioner had committed adultery, the petition must be dismissed.

Power, on behalf of the respondent, stated that if His Honor found no cruelty he would ask for a judicial separation for the husband on the ground of the petitioner having left him, and also on the ground of her general misconduct and disobedience to the respondent; and in the event of His Honor finding that the petitioner had been guilty of adultery he would also ask for a judicial separation for the respondent; but in any case he would ask that the children should be handed over to the custody of the respondent. He stated that the respondent was willing to give alimony if the custody of the children was given to him, and that he would allow the petitioner to have access to the children in the presence of a respectable third party to be named.

His Honor stated that this was the first occasion upon which the question of the custody of children had come before the court, and he must therefore proceed with great caution.

The following cases were cited:—*Martin* v. *Martin*, 27 *L.J. P. & M.* 106; *Suggate* v. *Suggate*, 28 *L.J. P. & M.*, 46; *Cartledge* v. *Cartledge*, 31 *L.J. P. & M.* 85; *Seddon* v. *Seddon*, 31 *L.J. P. & M.* 101.

On the 27th May, His Honor delivered judgment as follows:—In this matter I intimated my opinion upon the main question of fact yesterday. The suit is one for judicial separation, not for dissolution of the marriage, and there are certain specific grounds upon which alone a decree can be made. There is a discretion of course with the court to make a decree or to withhold it; judicial separation may be obtained either by the husband or the wife on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. In this case the wife alleges that she is entitled to judicial separation on the ground that her husband had been guilty of cruelty to her. I thought, and I still think, that she has entirely failed to convict her husband of cruelty. The jurisdiction of the court rests upon the fact, if found, that there was cruelty; and if it should be found by the court that there was no cruelty, why then the jurisdiction fails. That being so, it is my duty to dismiss the petition. The husband, in his defence, alleged against her that she had been guilty of adultery. That would be a bar to her claim for judicial separation if proved. Her own case having failed, it is quite unnecessary for me to go into the question of adultery at all, unless I have some jurisdiction for the purpose of dealing with the question of the custody of the children of the marriage. I think the case of *Seddon* v. *Seddon* (31 *L.J. P. & M.* 101-2) confirms the impression which I had yesterday from the perusal of the statute that where the jurisdiction fails for want of proof of the original cause of judicial separation I have no residuary or collateral jurisdiction to deal either with the question of alimony or of the custody of the children. The whole matter goes, it seems to me, when once the petitioner—whether husband or wife—fails to prove his or her case. The question of adultery, as I have said, would only be important in connection with the question of the custody of the children, and as I have no power to deal with that now, it is unnecessary to deal with the alleged adultery. I will give no opinion on that at all, because it is unnecessary, and because I might perhaps damage the interests or rights of the parties in some other proceeding—or, on the other hand, I might affect the character of the woman with so serious a reflection without being able to deal with it in any way as a matter in the cause. I refrain, therefore, from any opinion or any judgment upon the conduct of the wife. Now the case of *Seddon* v. *Seddon*, which is founded on the English statute and which was

before Sir Cresswell Cresswell, who was at the time Judge Ordinary of the English Divorce Court, decides that where the petition is dismissed the jurisdiction is gone. The judgment is given on page 102, very shortly but pithily. Sir Cresswell Cresswell says: "If I dismiss the parties I make no decree, and have no power to make any order in respect of the custody of the children. As to them the parties must have recourse to the Courts of law or equity." Probably it is to be regretted that I find no power in our statutes enabling me to deal with the matter. It might save expense, and be a very beneficial jurisdiction to exercise in this case if I had it; but it is quite clear that I have no power to deal with the matter, and I have no further jurisdiction except to give costs. The two clauses in our Acts relating to the custody of children are the 30th of our original Act (28 Vict., No. 29), which deals with the making of orders relating to the custody, maintenance, and education of children during the pendency of the petition and before any decree has been made. Our later Act, 39 Vict., No. 18, in sec. 8, confers a power on the court to deal with the same subject matters after a final decree of judicial separation. Well, inasmuch as no order was made as to the custody of the children during the pendency of the petition, if I dismiss it then I make no final decree of judicial separation. I simply dismiss the petition and send the parties out of court, and in such a case our statutes contain no reservation of any particle of jurisdiction on which I could found an order relating to the custody of the children. I regret it very much indeed, because in this case a beneficial jurisdiction might be exercised, but I cannot assume a jurisdiction which the law has not conferred upon me. My judgment, then, is that the petition be dismissed, and that the respondent pay the wife's costs.

Power applied that a day might be fixed for the hearing of an application respecting the custody of the children, before his Honor in Chambers.

His Honor stated that he would hear the application at 10 o'clock on the following Thursday morning.

Solicitors—*Smith & Smith* for petitioner. *Mein* for respondent.

In Chambers. June 2nd.

IN THE MATTER OF WILLIAM HENRY EWING AND MARGARET ROSE MACINTOSH EWING, INFANTS.

Custody of Children — Practice — Legal right of father to their custody.

Petition presented by William Henry Ewing, the father of the abovenamed infants, praying that Isabella Ewing, his wife, be ordered to deliver the said infants into his custody.

Power, for petitioner, contended that the father had a common law right to the custody of the children, and even if he had no such right in this case the mother had been shown not to be a proper person to have custody of them.

Rutledge, for Mrs. Ewing, submitted that the court would not interfere; that it was simply a domestic quarrel and not a matter to be dealt with by the court, and that a petition was not the proper way of moving the court.

Lilley, C.J.: There is no question as to the legal right of the father to the custody of the children. The law makes the father the absolute lord of both wife and children—under certain exceptions with respect to nurture—he could take the children from his wife as long as he did not commit a breach of the peace. But the law permitted the mother to have access to them as long as her conduct was irreproachable. The question here is: Has the proper procedure been taken? Can the court interfere merely on a petition, or must a bill in Equity be filed and the infants be made wards of court?

The following authorities were referred to:—*Eyre* v. *Shaftsbury*, 2 *Peere Williams*, 102; *In re Agar—Ellis*, *L.R.*, 10 *Chan. Div.* 49; *Stourton* v. *Stourton*, 8 *De G., M. & G.*, 760.

Lilley, C.J., referred to *In re Spence*, 2 *Ph.* 247, and *In re McCullochs*, *Drury*, 276.

Power applied for leave to amend petition by adding to the prayer that the children be made wards of court.

Petition amended accordingly.

LILLEY, C.J.:—I pronounce no opinion as to the conduct of the wife, which is not before me on this application. It is simply a case of a father asserting his legal right to the custody of his children, and they are of an age when it will do them no harm to remove from their mother. Upon the authority of *In re Spence* and *In re McCullochs*, I am of opinion that this matter can be dealt with on petition, but I must first make the children wards of court. That being done, it only remains for me to make the terms of the order as favorable to the mother as possible under the circumstances. I think that at the time of access to the children she should have an opportunity of indulging in any maternal affection—that she should not be placed under espionage. The children being wards of court are under its care, and I can deal with the conduct of the father as well as that of the mother if necessary. The mother must understand that her access to the children depends upon her conduct and upon her living an irreproachable life. I therefore order that the children be made wards of Court, and be placed under the custody and control of the father; that the mother have access to the children twice a week between the hours of 8 and 5 in the afternoon, and in the presence of Isabella Lawrie, wife of John Lawrie, of Kedron Brook, in whose house the petitioner is now living. I allow the wife's costs at £2 2s.

Solicitors—*Mein* for petitioner; *Smith & Smith* for Mrs. Ewing.

IN CHAMBERS.

June 8th, 10th, and 15th.

(Before his Honor Mr. Justice Pring.)

THE QUEEN *v.* LOUIS HUSTIN, CALLED LOUIS JOSEPH WATIER.

Extradition Acts of 1870 and 1873, and the Extradition Act (Queensland) 1877, and Extradition Treaty with France.

ON the application of *G. E. Markwell*, solicitor for Louis Hustin, a confinee in Brisbane gaol, made on the 8th June, Pring, J., granted a writ of *habeas corpus*, commanding F. R. Bernard, keeper of H.M. gaol at Brisbane, to produce the body of Hustin in court on the 10th intant.

On the said 10th day of June Mr. Bernard having produced the body, as commanded, and also the writ of commitment, *Markwell* moved the discharge of the prisoner on the several grounds as contained in the affidavit of Hustin, which are fully set out in His Honor's judgment *infra*:—

Cooper, A.G., for the Crown, submitted that under article 16 of the treaty, which provides that "*the requisition for the surrender of a fugitive criminal who has taken refuge in a colony or foreign possession of either party, shall be made to the Governor or chief authority of such colony or possession; or if the fugitive has escaped from a colony or foreign possession of the party on whose behalf the requisition is made, by the Governor or chief authority of such colony or possession*," any of the persons mentioned in the article might make the requisition, where the prisoner has escaped from a colony; that if the Governor of the colony was the only person who could make the requisition, the words "*Escaped from a colony*" could apply only to cases where the prisoner had been sentenced by the local authorities in the colony, otherwise there would be no reason why the Governor could alone make the requisition.

As to the validity of the warrant for arrest, he submitted that under article 7 of the treaty, and subsec. 2 of sec. 17 of the Extradition Act of 1870, the Governor of a British colony has the same power as a police magistrate in England has under the act; and that therefore when once the prisoner has been arrested under the warrant of the Governor and brought before the Police Magistrate, he had jurisdiction to hear the case; and further that it was not necessary that he (the P.M.) should have sufficient evidence that the prisoner had been sentenced for the particular crime charged in the warrant; it would be sufficient if he were found to have been sentenced for any extraditable offence.

PRING, J., reserved his decision till the 15th instant, and on that day he delivered the following judgment:—

Louis Hustin, called Louis Joseph Watier, was brought before me on Friday, the 10th instant, by F. R. Bernard, keeper of Her Majesty's gaol, Brisbane, in obedience to a writ of *habeas corpus*, ordered by me on the 8th instant to be issued on the application of Mr. G. Markwell for the confinee, which writ was made returnable before myself. Mr. Bernard handed in the writ and the return which I ordered to be filed. The return was a warrant of committal of Louis Joseph Watier, under the hand and seal of Philip Pinnock, Police Magistrate of Brisbane, and was as follows:—

QUEENSLAND TO WIT.

To Michael Doyle, constable, and to all other constables of the Queensland Police Force, and to the keeper of the Brisbane Gaol.

Be it remembered that on the 26th day of May, in the year of our Lord 1881, Louis Joseph Watier, late of the colony of New Caledonia, a colony or possession of the realm of France, is brought before me, Philip Pinnock, Esq., Police Magistrate for Brisbane, sitting at the Police Court at Brisbane, to show cause why he should not be surrendered in pursuance of the Extradition Acts of 1870 and 1873, and of a treaty entered into on the 14th day of August, 1876, between Her Majesty and the then President of the French Republic, on the ground of his being convicted of the commission of the crime of fraudulent bankruptcy and forgery, and uttering within the jurisdiction of the realm of France. And forasmuch as no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said acts and treaty,—

This is therefore to command you, the said Michael Doyle, and to all other police officers in the said colony, in Her Majesty's name forthwith to convey and deliver the body of the said Louis Joseph Watier into the custody of the said keeper of the gaol at Brisbane aforesaid, and you the said keeper to receive the said Louis Joseph Watier into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Acts and treaty, for which this shall be your warrant.

Given under my hand and seal at Brisbane, in the said colony of Queensland, this 26th day of May, A.D. 1881.

PHILIP PINNOCK, Police Magistrate.

Mr. G. Markwell then moved for the discharge of the confinee, and sought to impeach the return on several grounds which are set forth in the affidavit of the confinee, and he referred to this affidavit, an affidavit of Tom Else, verifying an attached copy of proceedings taken before the Police Magistrate, and an affidavit of G. Markwell, verifying attached copies of a warrant under the hand and seal of Sir A. E. Kennedy, Governor of Queensland, and of a warrant of committal under the hand and seal of Philip Pinnock, Police Magistrate of Brisbane, which affidavits had been filed and used on the application for the writ. Mr. Attorney-General (Pope Cooper) appeared for the Crown, and making no objection, I allowed these affidavits to be used. The objections above referred to are as follows:—

That the commitment is illegal on the following grounds:—

1. The requisition for my surrender was not made in accordance with the provisions of the 16th article of the Extradition Treaty, but was made by Edward Barrow Forrest, the vice-consul of the Republic of France, stationed in Brisbane, and the said vice-consul made his requisition for my surrender to His Excellency the Governor of Queensland, whereas the said requisition should have been made to His Excellency the Governor aforesaid by the Governor or chief authority of New Caledonia.

2. The said warrant states that I was convicted of the commission of the crime of robbery, but there is not the least evidence against Louis Joseph Watier to that effect. And the evidence adduced shows that Louis Joseph Watier was detained in New Caledonia on the charge of fraudulent bankruptcy and falsification of documents.

3. That the nature of the particular offence against the bankruptcy laws of France is not set forth, so that it is impossible to say whether it is of such a nature as would be deemed an offence against the bankruptcy laws of this colony.

4. That falsification of documents is not a crime set forth in the said Extradition Treaty.

5. Under article 7 of the said treaty it is provided that the warrant shall clearly set forth the crime of which the person claimed has been convicted, and state the fact, place, and date of his conviction; and I say that the warrant of His Excellency aforesaid, by virtue of which I am now in custody, does not state the date of the alleged conviction against me.

At the time I allowed these affidavits to be received I was of opinion that they were not admissible to *impeach the return*, but I thought they might be admissable for the purpose of showing a *want* or *excess of jurisdiction* in the Police Magistrate. The warrant of committal (the return) is in the form set forth in the second schedule to the Extradition Act of 1870, and by section 20 of this Act this form of committal, *when used*, shall be deemed to be valid and sufficient in law. I am of opinion, therefore, that the return is good on

the face of it, and I decline to use the affidavits for the purpose of impeaching this return, as I think they are inadmissible for that purpose. This is a case which comes within the statute 31 of Car. 2, c. 2, and the cases show that the court will not receive affidavits impeaching the return. (See case of *The Sheriff of Middlesex*, 2 *A. and E.*, *p.* 278; *in the matter of Clarke*, 2 *Q.B.*, *p.* 619; *Brennan's case*, 10 *Q.B.*, *p.* 498, and *Carus Wilson's case*, 7 *Q.B.* 984, and the judgment of Lord Denham, C.J., p. 1008.) Unless, therefore, it can be proved by the affidavits that there has been *a want or excess of jurisdiction*, as I hold the return to be good, this motion must be discharged, and the confinee, Louis Joseph Watier, will be remanded. I find no facts disclosed in the affidavits which would warrant me in deciding that in this case there was either a *want or excess of jurisdiction*. The confinee was arrested by virtue of a warrant under the hand and seal of Sir A. E. Kennedy, Governor of Queensland, and this warrant is as follows:—

By His Excellency Sir Arthur Edward Kennedy, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Companion of the Most Distinguished Order of the Bath, Governor and Commander-in-Chief of the Colony of Queensland and its dependencies.

To all and each of the constables of the police force of Queensland.

Whereas a treaty was concluded on the 14th day of August, 1876, between Her Majesty and the then President of the French Republic for the mutual extradition of fugitive criminals. And whereas, by an Order-in-Council of the 16th day of August, 1878, setting forth the said treaty, Her said Majesty, by and with the advice of Her Privy Council, under and by virtue of the authority committed to Her by the Extradition Acts of 1870 and 1873, did order, and it was thereby ordered, that from and after the 31st day of May, 1878, the said recited Acts should apply in the case of the said treaty with the President of the French Republic. And whereas in pursuance of the said treaty and the aforesaid Acts a requisition has been made to me, Sir Arthur Edward Kennedy, Knight, Governor of the colony aforesaid, by Edward Barrow Forrest, Esquire, whom I, the Governor aforesaid, recognise as vice-consul for France in Queensland, for the surrender of Louis Joseph Watier, late of the colony of New Caledonia, a colony or possession of the realm of France, convicted of the commission of the crime of robbery within the jurisdiction of the said realm of France. These are therefore to command you forthwith, in Her Majesty's name, to apprehend the said Louis Joseph Watier, wherever he may be found in the colony of Queensland, and bring him before the Police Magistrate at Brisbane, in the said colony, to show cause why he should not be surrendered in pursuance of the aforesaid treaty and Acts, for which this shall be your warrant.

Given under my hand and seal, at Toowoomba, this 14th day of April, in the year of our Lord 1881, and in the forty-fourth year of Her Majesty's reign.

A. E. KENNEDY.

He was then taken before the Police Magistrate of Brisbane (Mr. Pinnock), and charged with *escaping from the settlement of New Caledonia*. It appears to me that under the Extradition Acts of 1870 and 1873, and the Extradition Act (Queensland) 1877, and the extradition treaty with France, that the Governor's warrant for the confinee's arrest was good, and that the Police Magistrate, when the confinee was brought before him to be dealt with under these Acts and this treaty, was, so to say, seized of the case, and had jurisdiction to hear and adjudge upon it. By subsection 2 of the 17th section of the Extradition Act of 1870, it is provided in reference to proceedings to be taken as to fugitive criminals in British Possessions, that "No warrant of a Secretary of State shall be required, and all powers vested in or acts authorised or required to be done under this Act by the Police Magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal may be done by the Governor of the British Possession alone." Since the Extradition Act (Queensland) 1877 has by Order-in-Council become law, the mode of procedure required by the Acts and treaty to be followed by the Secretary of State and Police Magistrates in England would be the most expedient course to follow (which course of procedure I indicated during the argument). I do not think, however, that the power conferred on the Governor by subsection 2 of section 17 of the Extradition Act of 1870 is taken away. The warrant of arrest in this case I hold to be good in this respect. With regard to the first objection, I decide that Mr. E. B. Forrest, being recognised by the Governor as vice-consul of France in this colony, had authority to make the requisition for the surrender of the fugitive criminal, Louis Joseph Watier. Sub-

section 1 of section 17 of the Extradition Act of 1870, and article 16 of the treaty, give power to a Governor in a colony to make the requisition, but this, however, does not, I think, interfere with the power given to a consul or vice-consul by the same subsection and article. The first objection therefore is bad. The other objections appear to me to go to the judgment and decision of the police-magistrate, which I do not feel myself at liberty to review. The formal judgment is that this motion be discharged, that the writ of *habeas corpus* be quashed, and that the confinee Louis Joseph Watier be remanded to his former custody, under the warrant of committal exhibited and filed as the return to the writ.

IN INSOLVENCY.

IN THE INSOLVENT ESTATE OF THOMAS QUINN.

Insolvency Act of 1874—*What under sec.* 167 *are circumstances for which the Insolvent cannot justly be held responsible.*

HARDING, J., delivered the following judgment, in which the facts of the case sufficiently appear:—

This is an application by Thomas Quinn, an insolvent, for a certificate of discharge under section 167, subsection 1, of the Insolvency Act of 1874. The section enacts as follows:—"At any time after the insolvent has passed his last examination, or at any earlier time with the consent of his creditors, testified by a special resolution, the insolvent may upon the prescribed notice, apply to the court for a certificate of discharge; but such certificate shall not be given unless it is proved to the court either (1) that the insolvency has arisen from circumstances for which the insolvent cannot justly be held responsible, or (2) that a special resolution of the creditors has been passed to the effect that his insolvency has arisen from such circumstances as last aforesaid, and that they desire that a certificate of discharge shall be granted to him, or (3) that the gross amount realised in the estate is equal to the total amount of debts proved in the estate. But the court may nevertheless suspend for such time as it deems to be just, or withhold altogether the certificate of discharge, if it appears to the court by sufficient evidence that the insolvent has made default in giving up to his creditors the property which he is required by this Act to give up, or that a prosecution has been commenced against him in pursuance of the provisions relating to the punishment of fraudulent debtors contained in the Act."

There is no corresponding section in the English Insolvency Act of 1869, consequently there are no English decisions which go to show the principles under which such a certificate should be granted. Under these circumstances, it is desirable to ascertain if this court has in any reported decisions laid down any such principles. The only reported decision in which such principles are in any way laid down or discussed, is that of *re J. & G. Harris*, *Queensland Law Reports*, *vol.* I. *pt.* 2, *p.* 2, in which the present Chief Justice, then Mr. Justice Lilley, says: "It is thrown upon the insolvent as a duty to satisfy the court by reasonable proof that his insolvency has arisen from something he cannot be held responsible for. The court would consider the absence of opposition in coming to a conclusion, and if on looking at the proceedings I think there is nothing against the insolvent all will be well." His Honor's previous observations show that by "responsible" he meant "justly responsible." There are some cases reported, in which the facts are set out, and which I have considered, and which it might be well to mention. So far as can be gathered from the reports in the *Courier* newspaper—the only reports accessible—certificates under the circumstances therein mentioned were granted under this subsection in the following cases. [His Honor here cited all the cases coming under sec. 167 of the Act, which had been reported in the *Courier*, during the years 1877, 1878, 1879, and 1880; and he dwelt upon the circumstances in each case, which gave rise to the insolvency.]

Now, although these cases are very shortly reported, yet they show that when a certificate should be granted, there should exist something in the

nature of misfortune on the part of the insolvent. But none of the reports shew whether or not it is necessary that the insolvent should not have been negligent in respect of the circumstances which led to his misfortunes; or whether or not such negligence existed in these cases.

Proceeding now to consider the principles which should guide the court in granting or refusing a certificate applied for under this subsection, as a preliminary, it is desirable to consider the several conditions on which certificates are to be granted in sections 167, 168, 169. I have read sec. 167. Secs. 168 and 169 are as follows:—

Sec. 168. "Whether any application shall have been made under the preceding section or not, the court at the time, and in the circumstances following, may, on the application of any insolvent who has not obtained a certificate of discharge, and after the prescribed notice, grant such certificate, and for such purpose may alter or vary any decision theretofore pronounced.

(1) At the expiration of 12 months from the date of adjudication with the assent testified in writing of a majority in number of the creditors whose debts amount to £10 and upwards, who have proved in the estate.

(2) At the expiration of 2 years without the consent of any creditor. Provided, that, upon any such application, the insolvent shall make oath that he has made a full and fair discovery of his estate, and has not granted or promised any payment or security, and has not entered into any collusive agreement for the purposes of obtaining such consent. But the court may nevertheless upon such application withhold the certificate, or suspend the same for such period as it shall deem just."

Sec. 169. "At the expiration of three years from the date of the order of adjudication, any insolvent who has not obtained a certificate of discharge may with the consent testified in writing of a majority of the creditors whose debts amount to £10 and upwards, who have proved in the estate, apply after the prescribed notice to the court for a certificate. And upon its being proved to the satisfaction of the court that such consent has been obtained, and has been so obtained without fraud or collusion, the court shall grant the certificate of discharge. Provided that upon any such application the insolvent shall make oath that he has made a full and fair discovery of his estate, and has not entered into any collusive agreement for the purpose of obtaining such consent."

Premising that the insolvent has passed his last examination, or obtained the consent of his creditors thereto, testified by special resolution, he may at any time apply for a certificate of discharge, and he will obtain it, if he prove the existence of the facts required in subsections 1, 2, and 3, of section 167—unless upon the affidavit of the facts mentioned in the latter part of the section it is suspended or withheld.

Whatever may have been the previous circumstances, he may apply for, and obtain a certificate of discharge at the expiration of twelve months from the adjudication, with the consent of a majority in number of his creditors, whose debts amount to £10 and upwards, and who have proved in the estate; at the expiration of two years, without the consent of any creditor, if he complies with the proviso of the section, and the court does not see fit to withhold or suspend the same. At the end of three years, with the consent of the above-mentioned majority, without power of refusal in the court, unless he fails to prove the absence of fraud or collusion in obtaining such consent, and the facts mentioned in the proviso.

The subsection for the purpose of the application may read thus:—

"Such certificate of discharge shall not be given unless it is proved to the court that the insolvency has arisen from circumstances for which the insolvent cannot justly be held responsible."

Reading this enactment, the questions which suggest themselves are—1. Did the legislature mean to place it in the power of the court to exercise a large discretion as to the circumstances for which the insolvent should be held responsible? or—2. Did it mean that the court, in deciding as to the circumstances for which the insolvent should be held responsible, should be limited to the rules which guide it in deciding on the responsibility of persons in its ordinary jurisdiction? Either of these questions being answered in the affirmative, the other receives a negative answer as a necessary sequence.

Possibly the solution is to be found in the use of the word "justly" in its primary and common sense meaning "in conformity to law," *i.e.* "legally." Giving the word "justly" this interpretation, a certificate should not be given unless it is proved that the insolvency has arisen from circumstances

for which the insolvent should not in conformity to law be held responsible. If this is the true interpretation, the rules of law entitling an insolvent to a certificate would be the same as would entitle him to relief from the consequences of his acts in the other jurisdictions of the court, and are definite and well known. The word "justly" means honestly and fairly. It may be said that using the word in this sense, a large discretion is given to the court. Is this so? Can it be said than a man can be legally or equitably responsible, and yet not honestly and fairly responsible, and *vice versa?* If it can, by what rules is the court to be guided in the exercise of its discretion as to such responsibility? Surely not by its ordinary rules for administering justice or granting relief. If it were, then it would be restricting itself to the use of the word "justly" as meaning "in conformity to law only." Consequently if the word "justly" is to be taken as meaning "honestly" or "fairly," and as thereby enlarging its previous meaning "in conformity to law," the guide for the exercise of this discretion must be the personal apprehension of the judge before whom the application is made, of the honesty and fairness as applied to that particular case. This would be a discretion bounded by no limit, and confined to no rule. This would lead to a mass of decisions ever varying from and irreconcilable with each other and the ordinary rules of court. These considerations point to the conclusion that the word "justly" should be read in its primary sense of "in conformity to law" if thereby it is possible of meaning other than "honest and fair." A cursory reading of subsection 2, of section 167 [*reads it*], adds color to the argument that the word "justly" means more than "in conformity to law" and gives a large discretion to the court, otherwise, what would be the use of letting the creditors decide, if they have to decide in accordance with strict law, and not to exercise their uncontrolled discretion. The functions to be performed under subsection 2, are something in the nature of those appertaining to the duties of arbitrators, whose determination must be abided by, and whose award will not be set aside on the ground of their having decided contrary to the rules of law—unless their mistakes appear on its face. That any mistake of law should appear on the face of the resolution would be a rare occurrence. Now it would seem that all subsection 2 does, is to constitute a different tribunal, both of law and fact—whose decision is final, and which as to its law should be guided by the rules of the court, but whose decision if not so guided is yet absolute, consequently the argument alluded to does not effect the previous observations. This view is strengthened by the consideration that notwithstanding that an insolvent may not be able to show his want of just responsibility for the circumstances from which the insolvency arose, he may at the expiration of one, two, and three years, in the manners I have pointed out, obtain a certificate. Such observations all tend to the conclusion that the first question with which I started must be answered in the negative, and that the true interpretation of the section is, that the court, in deciding as to the circumstances for which the insolvent should be held responsible should be limited by the rules which guide the court in deciding on the responsibility of persons in its ordinary jurisdiction. A person can be justly held responsible only for that for which he is legally responsible. In his dealing with others, if *sui juris*, he is held responsible for his acts and omissions done intentionally, and to which he has given his complete and free consent, if he seeks to justify or excuse himself from responsibility for his acts of commission or omission by pleading that they were the result of accident or of mistake, or of fraud perpetrated by others, the law generally accepts such justification and excuse if he can show that the circumstances from which his responsibility arose were (1) the result of accident, intending thereby, not merely inevitable casualty or the act of Providence, or what is technically called *vis major*, but such unforeseen events, misfortunes, or omissions as are not the result of any negligence or misconduct on his part. (2) The result of mistakes, which may be considered as included in the definition of accident, but as contra-distinguished from it, meaning

"some unintentional act or omission, or error, arising from unconsciousness, ignorance, or forgetfulness, surprise, imposition, or misplaced confidence not due to negligence." (3) The result of a fraud perpetrated on him by others, and attributable only to that want of due diligence which may fairly be expected from a reasonable person.

An insolvent must then, in applying for a certificate of discharge on the ground that he cannot justly by held responsible for the circumstances from which his insolvency arose, support his application on one of those three grounds. The onus of proving the affirmative is on him. He it is who must come prepared to show that such circumstances were beyond his own control, or that his acts which were the cause of them were done by him in entire good faith, and in the performance of a supposed duty—without negligence. If he fails, he is not entitled to the relief afforded him by the statute.

It has often been urged as a ground for granting the certificate that creditors do not appear and oppose. [*His Honor after referring to the circumstance which might give rise so this state of things, continued*—] Such a ground must be of the least—if of any value. The negligence on the part of the insolvent which is to debar him from receiving his certificate, assuming that he has been able to show that the circumstances which caused his insolvency were beyond his control, or were done by him in good faith, and in performance of a supposed duty, is a negligence arising from the neglect of a duty, the duty which every person owes to every other with whom he deals to pay him what he may owe him when the time for such payment shall arise.

If the insolvent has conducted his business with the prudence and care which persons of reasonable or ordinary prudence use in the management of their own affairs, he will be entitled to receive a certificate of discharge. If he has not, his application for a certificate should be refused. In this case, the insolvent says, that the cause of his insolvency was the destruction by fire of the whole of his stock in trade. But from other affidavits I gather that it was through an adverse verdict in an action against a fire insurance company, which adverse verdict was brought about by the insolvent in his claim, over-estimating the value of his stock. The fire may have been an accident, such as I have before referred to, but I cannot think the over-estimated claim was. It was by reason of that, that the creditors suffered, consequently, I think, that the insolvency has not arisen from circumstances for which the insolvent cannot justly be held responsible, and that he must be refused a certificate of discharge.

Certificate refused accordingly.

The following are the cases reported in the *Courier* to which His Honor referred in the judgment:—

Re G. A. P. & A. F. J. Hirst, 15th March, 1877.—*Re J. & G. Harris, ex parte G. Harris*, 9 March, and 2nd April, 1877.—*Re Thos. Appleby*, 13th Sept., 1877.—*Re Jas. Boyd*, 21st Sept., 1877.—*Re Crawley & Co.*, 15th October, 1877.—*Re H. Smith*, 4th Feb., 1878.—*Re J. P. S. & A. Pinwell*, 10th July, 1878.—*Re J. H. Dunlop*, 26th August, 9th Sept., 1878.—*Re N. P. Johnson*, 26th August, 1878.—*Re Kennedy, De Fraine & Co., ex parte Edwards*, 18th June, 1879.—*Re Ed. Grant*, 18th June, 1879.—*Re L. S. Baisson*, 18th June, 1879.—*Re J. Scott*, 6th and 11th October, 1879.—*Re C. Atkins*, 20th Oct., 1879.—*Re C. Barnham*, 20th Oct., 1879.—*Re Thos. Grice*, 20th Oct., 1879.—*Re R. Armour*, 12th December, 1879.—*Re Jas. Gillespie*, 12th April, 1880.—*Re J. T. Edgely*, 12th April, 1880.—*Re C. Verdon*, 12th April, 1880.—*Re E. Slaughter*, 12th April, 1880.—*Re R. J. Byrne*, 11th Oct., 1878.—*Re J. Goldsmid*, 4th and 6th February, 1880.—*Re Chas. O'Brien*, March, 1880.—*Re Wm. Devine*, Feb. and March, 1880.—*Re Colin Munro*, 20th March, 1879.—*Re Warde*, 25th April, 1879.

IN CHAMBERS.

Harding, J. June 3rd, 1881.

IN THE INSOLVENT ESTATE OF GEORGE JAMES GREENSLADE.

Sec. 179 of Insolvency Act of 1874.

Misnomer of Insolvent by non-insertion of a second christian name does not invalidate proceedings in Insolvency, and the Court may insert such name and order further proceedings to be taken in the full name of the Insolvent.

In this case George Greenslade was adjudicated an insolvent on the 3rd June, on a creditor's petition, in the name of George Greenslade, his name in fact being George James Greenslade. The order of adjudication had been drawn up, and the advertisements subsequent thereto, had been issued in the name of George Greenslade only. Under these circumstances, an application was made on behalf of the official trustee and petitioning creditor for leave to amend the proceedings by inserting the name of "James" between the names George and Greenslade throughout the proceedings. *Miskin* (*Macpherson's* office) appeared for the official trustee and petitioning creditor, and referred to sections 179 and 11 of the Insolvency Act.

His Honor referred to a previous case before him on the 4th August, 1880, that of *Re Michael Woods*, in which case a similar order had been made on the application of the official trustee, the adjudication having been made on the insolvent's petition.

His Honor made the following order:—

Order *nisi* calling upon the insolvent to show cause before the judge sitting in chambers on the 9th June, why an order should not be made declaring that the proceedings heretofore had in this estate are valid, notwithstanding that the name "James" has been omitted between the names George and Greenslade, and why an order should not be made that such proceedings should be amended by inserting the name "James" between the names George and Greenslade therein. And that all subsequent proceedings herein should be carried on and had under the name of George James Greenslade. Dispense with the necessity of a four days' service of this order, under rule 39 of the Insolvency Rules.

Order this order to be advertised in the *Telegraph* of the 7th June, and the *Courier* of the 8th June, and let it be served in the same manner as the petition for adjudication in the estate was served. And let such advertisements and service be held good service of this order. (The service of the original petition had not been personal.)

On the 9th June, *Miskin* applied to make the order absolute, which His Honor did; directing it to be advertised and served as if it were an order of adjudication, and directing the publication of subsequent advertisements as on an order of adjudication. Costs to come out of the estate.

Solicitor, *Macpherson*, for official trustee and petitioning creditor.

Lilley, C.J. July 11th, 1881.

NEVILLE *v.* NATIONAL FIRE AND MARINE INSURANCE COMPANY.

Foreign Company carrying on business through agent—Substituted service on agent allowed, where prompt service cannot otherwise be effected.

Power applied under Order 9, Rule 2, of the Judicature Act, which is as as follows:—

"When service is required the writ shall wherever it is practicable be served in the manner in which personal service is now made but if it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service the Court or a Judge may make such order for substituted or other service or for the substitution of notice for service as may seem just."

to allow the service of the writ in this case upon Mr. E. B. Forrest, the agent of the Company in Brisbane, to be good service, and to amend the writ by the insertion of the amount claimed.

The action is brought to recover a sum of £250, under a fire insurance effected with the Queensland Branch of the Company, through G. B. Shaw, of Rockhampton. The form of proposal and the receipt for the premium bore the heading "Queensland Branch," and a plate bearing the name of the Company was affixed to the premises of Messrs. Parbury, Lamb & Co., Brisbane. The writ had been served upon Mr. E. B. Forrest, the resident partner, but no appearance had been entered.

Power contended that as the Company carried on business here, although not registered, service upon their agent would be sufficient, and that the only way the Company could be prejudiced was, that they might find it necessary to ask for time. He quoted the following cases:—"*Newby v. Colt's*

Patent Fire Arms Co., L.R. 7 Q.B. 293; Mackreth v. the Glasgow and South Western Railway Co., L.R. 8 Exch., 149.

Lilley, C.J.:—The contract was made here, and there is evidence that the Company is a foreign corporation carrying on business here through Mr. E. B. Forrest, their head officer, and prompt service cannot otherwise be effected. The writ can be amended, and substituted service be made upon Mr. E. B. Forrest, the chief officer of the Queensland branch of the Company.

Solicitors for plaintiff: *Rees Jones and Brown*, Brisbane and Rockhampton.

Lilley, C.J. July 18th, 1881.

DAVIS *v.* MACLEAN—*In re* MACLEAN.

Sec. 102 of Insolvency Act of 1874.

The words "*costs and expenses of the execution creditor*" in sec. 102 mean the costs and expenses of the execution creditor after judgment, and they have no relation to the costs of the action.

Motion for an order of the court directing the sheriff to pay to the execution creditor, under the 102nd section of the Insolvency Act of 1874, out of the moneys in his hands, the proceeds of the execution, the amount of the execution creditor's taxed costs, or so much thereof as the moneys in his hands would extend to.

The matter was really a question of practice involving the interpretation of the words of the section referred to, in respect of which the decision of the court was sought. The sheriff construed the words of the section to apply to the actual costs of the execution only, and not to cover the execution creditor's costs up to judgment.

The execution was in respect of a sum exceeding £50. After sale, and within fourteen days, the sheriff was served with notice of the filing of an insolvency petition against the debtor which was followed by adjudication.

Miskin (from *Macpherson's* office) contended on behalf of the execution creditor, that the words of the Act were explicit and obvious, *i.e.*, "*the costs and expenses of the execution creditor.*" Had the word "creditor" been omitted, the construction sought to be placed upon the words by the sheriff might have been tenable. The costs of the execution creditor must mean the whole of his taxed costs, of which the sheriff had notice, it being endorsed on the face of the *fi. fa.* in the direction to the sheriff to recover.—That the costs of judgment and of execution are all one, and cannot be separated.—That the intention of the legislature in framing the Act is plain, the execution creditor is deprived of his security to which he is entitled by the common law and of the right which the policy of the law confers upon the diligent suitor by express provisions of the statute, and as compensation it was intended to place him in an equally good position with the other creditors who benefit by the result of his action, namely, the securing the property for the general benefit. It would be unjust that he should receive only a dividend upon the money he has paid for his costs. This view is entirely supported by reference to the analogous section (No. 68) of the Insolvency Act of 1864, which was being then repealed by the present Act, the words of which were "the actual costs of the execution," in cases where goods are under seizure by the sheriff at the time of the insolvency. And again, by comparison with the corresponding section (No. 87) of the English Bankruptcy Act of 1869, of which our section is a transcript, with the exception of the following words introduced into ours, *i.e.* "*as much thereof as shall be sufficient to defray the costs and expenses of the execution creditor*" and which, deliberately imported by the framers of our Act, must have been so added with an object. Had the section of the English law been adopted without alteration, undoubtedly the execution creditor could only have the actual costs of execution, and had the legislature intended this, they would have left the section as it was in the English Act. The execution creditor's right to his taxed costs was ruled by *Lutwyche, A.C.J.*, in *A.J.S. Bank v. Leighton*, 7th April, 1879.

Lilley C.J.:—I think the costs and expenses mentioned in section 102 are the costs and expen-

ses after judgment, which relate to the security of which he is deprived by the operation of that section, and that they have no relation to the costs of the action. He loses his security—that is, the benefit of the execution—but having been put to expense he is indemnified for the loss of his security, and placed in precisely the same position as the other judgment creditors, if any. The creditor is entitled to the costs of his execution and those following and incidental to it, but not to the taxed costs of the action up to judgment.

Solicitor, *Macpherson*, for execution creditor.

HARDING, J. July 20th, 1881.

IN THE INSOLVENT ESTATE OF BRADSHAW BARKER.

Release of Trustee—Insolvency Act of 1874, sec. 166.

Brown (of Rees R. Jones and Brown) applied to fix the 16th September for the trustee to apply for his release.

HIS HONOR, in giving his decision in the matter said:—This is an application by the trustee for the close of the insolvency. It appears that the insolvent has not yet applied for his certificate of discharge; consequently, on that application, the court may desire to obtain from the trustee some information as to the circumstances from which the insolvency has arisen. If the estate is closed, the next step to be taken by the trustee is to obtain his release. In order to enable him to do this he has to make a report to the creditors. The law does not require him to give any information as to such circumstances in his report; consequently, if the insolvency is closed, and the trustee obtains his release without giving information as to such circumstances, it may be impossible at a future time to obtain such information. I believe it is the practice of the Chief Justice to require the presence of the trustee on the application by insolvent for a certificate. In several cases I have required it myself. The 166th section, on which this application is based, makes it imperative on me, if satisfied that the whole of the property has been realised, to order that the insolvency be closed. The course I propose to take, to meet what I consider the necessity of the case, and to provide the information as to the circumstances from which the insolvency has arisen, which I may hereafter require, is,—that this present application do stand adjourned till the 28th of July next, and I direct the trustee in the interval to file in the Supreme Court a report of the circumstances from which the insolvency has arisen, and tending to prove whether or no the insolvent should be responsible for the same.

Solicitors for trustee, *Rees R. Jones and Brown*, Brisbane and Rockhampton.

HARDING, J. August 27th, 1880.

MUNICIPAL COUNCIL OF ROCKHAMPTON *v.* BENNETT.

Sec. 208, of the "Local Government Act of 1878."

Section 208 of "The Local Government Act of 1878," is retrospective in its operation and renders rates which, before its passing, were a charge upon property, recoverable against the owner of such property, with interest at eight per centum per annum, from the making of such rates.

THE facts in this case appear clearly in the judgment:—

Brown (Rees R. Jones and Brown) for plaintiffs; *Pope A. Cooper*, for defendant.

HARDING, J.:—This matter comes up on a summons for judgment on a specially endorsed writ. It was conceded that the defendant would be liable for moneys sued for, if the point of law raised under the Local Government Act of 1878, section 201, was decided in the favor of the plaintiff. The question for decision is one of the construction of several Acts, and is one of considerable difficulty, and I am of the opinion, that such a question should not be raised in this manner. I have taken the matter into my careful consideration, and have given the parties their choice, and they have preferred that I shall deliver judgment at once. Accordingly I accede to their request. The claim is for arrears of rates made by the municipality of Rockhampton in respect of an allotment situated within that municipality, which has always belonged to the defendant Bennett, and has always been unoccupied,

The claim for rates extends over three periods, that is to say:—(1) Between the passing of the Municipal Institutions Act of 1864 and the Municipal Institutions Act Amendment Act of 1861; then (2) between the passing of the Act of 1868 and the Local Government Act of 1878; and (3) from the time of the passing of the latter Act till the commencement of this action. The liability in respect of all these rates before the passing of the Local Government Act of 1878 depends upon the construction of section 208 of that Act, and rests upon the question as to whether that section is retrospective or not. I approach the construction of that section having in my mind the ordinary rules to the effect that every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation; and also, that when the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed, however unjust and hard the consequences may appear. From these rules I start with a strong presumption, out of respect to the Legislature, that the construction of section 208 of the above-named Act of 1878 is not intended to be retrospective. But if I find a clear intention in the Act that it is to have a retrospective operation, it must be so construed, however hard and severe may be the result. I read section 208:—

"All rates heretofore made, &c., shall, if the same shall not have been paid at the commencement of this Act, be and remain a charge upon such property, and may at any time thereafter (and notwithstanding any statute of limitations) be recovered, together with interest at the rate of £8 per centum per annum from the making of the rates, from the owner of the property, and to the extent and subject to the provisions of the last but one preceding section, from the occupier for the time being of such property, in like manner as rates may be recovered from any occupier liable to be rated."

Now the question shortly is: Does section 208 of the Local Government Act of 1878, render rates which, before its passing, were a charge upon property, only recoverable against the owner of such property, with interest at 8 per centum per annum from the making of the rates? Now it will be well to consider what was the liability of the owner for those rates previous to the passing of the Act of 1878, as it is found laid down in section 80 of the Municipal Institutions Act of 1864, that is to say, from that Act of 1864 till the Amending Act of 1868. Now, on reading the above-named section 80, I find that the first part of it does not apply to this case, until we come down to the sentence commencing with the word "or." I will read the first paragraph:— "or where"—these are the words which I think apply to this case—

"Or where the premises shall be unoccupied, the tenant, landlord, or proprietor thereof, whether the occupier or not, may be sued for such rate or assessment and costs before the nearest Clerk of Petty Sessions,"

Then the provision comes in as follows:—

"Provided that no landlord shall be held liable for more than twelve months' arrears of rates on unoccupied property, and any such unpaid rate or assessment, with interest thereon at the rate of 5 per centum per annum, shall be and remain a charge upon the premises in respect of which the same is payable."

So far this proviso may be construed as limiting the liability of the landlord to one year's antecedent rates only. It was contended that it did away with the liability altogether. I can scarcely think that such was the case. Now the next paragraph I read is as follows:—

"And may be recovered at any future time upon and after the expiration of fourteen days after like service of like notice, as last aforesaid, upon any new occupier thereof, by distress and sale of any goods or chattels then found upon such premises in the same manner as if such new occupier had himself been the occupier primarily liable to pay such rate or assessment, with interest as aforesaid, and the production of the receipt for such overdue rate or assessment paid by or levied from any occupier so rendered liable, not being the tenant, landlord, or proprietor thereof, for any rate or assessment due or having accrued before the commencement of his occupancy, shall, to the amount so paid or levied, be a good and sufficient discharge in payment of rent to the tenant, landlord, or proprietor."

thus showing that these rates may be recovered against the occupier, who, if he pays them, may deduct the amount paid from his rent, and consequently indicating that the previous proviso, though constituting a bar, is a bar to the remedy alone, and not to the right.

If this construction is so, this Act left the rates at the time of its passing till the passing of the Amendment Act of 1868, as a charge on the property, the owner not being liable to be sued for them, although the occupier might be made to pay them, and if he did, he might deduct the amount so paid from the rent due to the landlord. As to the second period, the Municipal Institutions Act Amendment Act of 1868 repealed so much of the Act of 1864 as relates to the recovery of rates, &c., before the nearest Clerk of Petty Sessions, which is part of the 80th section already read, and in the second section enacted, that rates should be recoverable before the nearest Court of Petty Setsious, subject to the proviso, that the municipalities should sue for the same within six months of the time of such rates becoming due, so cutting down the year to six months, and using the ordinary words of statutes of limitations, consequently merely barring the remedy, and not the right. So, between these Acts, it would seem that the rates were a charge on the land as before, and the remedy against the owners was the same as before, with the exception, that the period during which he might be sued was reduced. Coming now to the Local Government Act of 1878, which repeals the preceding Acts, and in this 208th section revives rates already made, and which but for this section, would have ceased, and enacts that they may be recovered, together with interest at the rate of 8 per cent. per annum, and so on. Thus the rates charged on property may be recovered, and that revives the liability of the owner, and this would be so if the words, "*notwithstanding any statute of limitations*," were left out altogether. But these words make it to my mind still stronger, as I know of no act of limitation that would apply under the circumstances; therefore, I am of opinion, that these words were specially aimed at any doubt that might have arisen, and they take it out of the presumption that the Court holds out of respect for the Legislature.

In concluding, I may say, that I have gone into this matter at some length, because I can see that it is a matter of considerable importance. But, as I said before, a chamber application is scarcely the way in which a matter of this importance should be brought before a Judge.

As to the rates made in the 3rd period referred to above, it was not denied that in respect of these the defendant was liable.

The order will be in the terms of the summons, and as it is under £30, I shall certify for costs.

Solicitors for plaintiffs, *Rees R. Jones & Brown*, Brisbane and Rockhampton.

Solicitor for defendant, *Bunton*.

FULL COURT.

September 7th, 1880.

MILES *v.* M'ILWRAITH.

Constitution Act of 1867, sections 6 and 7.

Held, on demurrer to defendant's statement of defence that:—(1) The avoidance of the seat by the Assembly of a person sued for penalties under section 6 and 7 of the Constitution Act of 1867, is not a condition precedent to the liability to the penalties. (2) A person contracting as trustee for others is within the provisions of those sections. (3) A person, in order to make himself liable to the penalties under section 7, must have sat and voted as a member with knowledge of the contract at the time of such sitting and voting. (4) Two counsel may be heard for each party on demurrer.

THIS was an action brought by William Miles, a grazier residing at Dalby, a member of the Legislative Assembly, against Thomas M'Ilwraith, Premier and Colonial Treasurer of Queensland, for the recovery of penalties under the 7th section of the Constitution Act of 1867, for that on or about February 23rd, 1880, a contract or charter party was entered into between the Agent-General of the colony of Queensland, for and on behalf of the Government of Queensland, on the one part, and Andrew M'Ilwraith and Donald M'Eachern, trading as M'Ilwraith, M'Eachern and Co., on behalf of the owners, on the other part, for the conveyance of immigrants from England to Townsville by the ship *Scottish Hero*, of which ship, at the time of the making of the said charter party and up to the commencement of the action, the defendant was part owner, the number of registered owners of

the said vessel at the time not exceeding fifteen. In pursuance of this charter party, the ship sailed on the voyage mentioned therein; and on July 6th, 7th, 8th, 13th and 14th, 1880, while the said charter party was in force, and before the termination of the said voyage, the Defendant, contrary to the provision of sections 6 and 7 of the Constitution Act of 1867, sat and voted in the Legislative Assembly as a member thereof, whereby he forfeited the sum of £500 for each of those days. And the plaintiff claimed £2,500.

The defendant's statement of defence is in substance:—(1) That he did not authorise, but expressly forbade the making of the contract. (2) That he was only a trustee for others in a marriage settlement under which he had no present beneficial interest, and only a very remote interest in expectancy. (3) That his seat has not been declared void by the Assembly, and that such a declaration is a condition precedent to the plaintiff's right to sue. (4) That he is a member of the Legislative Assembly whose seat has not been declared void, and as such there is no penalty imposed on him for sitting and voting whilst he is a contractor, the only consequence of such an act being that his seat shall be declared void.

The plaintiff demurred to the whole of the defendant's statement of defence, except so far as it alleges the contract was made without authority from the defendant, for that they are bad in law on the grounds—(1) As to the agreement mentioned in the statement of defence, that it does not appear that such agreement controlled or varied the said charter party. (2) As to the agreement between M'Ilwraith, M'Eachern and Co. and the defendant (whereby it was agreed that any ships owned by defendant and chartered by the said firm for the said contract, should be paid for by the said firm at the average prices earned by David Hunter & Co's. ships in other trades), that the Government are not parties thereto, and that an agreement between contractors with the Government and third parties is immaterial. (3) That the liability of the defendant as one of the owners of the *Scottish Hero*, as between himself and the Government, is not affected by any arrangement between himself and third parties, to which the Government are not parties. (4) That the right of action under the Constitution Act is not dependent upon a prior declaration by the Legislative Assembly of the avoidance of a member's seat.

Griffith, Q.C., *Garrick*, and *Rutledge* appeared for the defendant, and argued at length in support of the demurrer. *P. A. Cooper*, and *Real* appeared for the plaintiff, and argued at length against it.

The following cases were cited during the course of the argument:—*Reg. v. Recorder of Cambridge, 8 E. & B., 637, 27 L.J. M.C., 160; Royse v. Birley, L.R. 4 C.P., 296; Davis v. Hardy, L.R. 9 Q.B., 433; Thompson v. Pearce, 1 Brod. & B. 25; 3 Moore 260.*

Sections 6 and 7 of the Constitution Act of 1867, are as follows;—

SECTION 6 (which creates the disability). "Any person who shall directly or indirectly himself or by any person whatever in trust for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being summoned or elected or of sitting or voting as a member of the Legislative Council or Legislative Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same and if any person being a member of such Council or Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it his seat shall be declared by the said Legislative Council or Legislative Assembly as the case may require to be void and thereupon the same shall become and be void accordingly. Provided always that nothing herein contained shall extend to any contract or agreement made entered into or accepted by any incorporated company or any trading company consisting of more than twenty persons where such contract or agreement shall be made entered into or accepted for the general benefit of such incorporated or trading company."

SECTION 7 (which imposes the penalties). "If any person by this Act disabled or declared to be incapable to sit or vote in the Legislative Council or Legislative Assembly shall nevertheless be summoned to the said Council or elected and returned as a member to serve in the said Assembly for any electoral district such summons or election and return shall and may be declared by the said Council and Assembly as the case may require to be void and thereupon the same shall become and be void to all intents and purposes whatsoever and if any person under any of the disqualifications mentioned in the last preceding section shall whilst so disqualified presume to

sit or vote as a member of the said Council or Assembly such person shall forfeit the sum of five hundred pounds to be recovered by any person who shall sue for the same in the Supreme Court of Queensland."

The following judgments were delivered :—

LILLEY, C.J. :—The defendant is and has been a member of the Legislative Assembly of the colony. He is sued for penalties alleged to have been incurred by him for sitting and voting whilst he was a contractor for or on account of the public service. His statement is of defence is in substance—1st. That he did not authorise, but expressly forbade the making of the contract. 2nd. That he was only a trustee for others in a marriage settlement under which he had no present beneficial interest. 3rd. That his seat has not been declared void by the Assembly, and that such a declaration is a condition precedent to the plaintiff's right to sue. 4th. That he is a member of the Legislative Assembly whose seat has not been declared void, and as such there is no penalty imposed on him for sitting and voting whilst he is a contractor, the only consequence of such an act being that his seat shall be declared void. The plaintiff has demurred to the whole of the statement of defence, except so far as it alleges that the contract was made without authority from the defendant. This includes all the paragraphs of the statement, except the 2nd and 5th, to which the plaintiff does not demur. These latter paragraphs contain an express denial of authority (par. 2) and an admission by the defendant that he sat and voted (par. 5). The defences may be more shortly stated thus: That the defendant was not liable, being only a trustee without beneficial interest in the contract; that as a member he was not liable to any pecuniary penalty, or, if liable, not until his seat had been declared void. The validity of these defences, as matters of law, depends entirely on the construction of the 6th and 7th sections of our Constitution Act of 1867; and for the purpose of deciding them we must regard his defences as in the nature of the old pleas in confession and avoidance, namely, that, as matters of fact, the defendant was a contractor, and, being still under contract with the Government, he sat and voted, but by reason of his being a trustee, or a member, or a member still holding his seat, he is not subject to the penalties. The Constitution Act of 1867 is a consolidation of out previous Act, 18 and 19 Vic., cap. 54, which, in respect to the inability of contractors to serve in Parliament, has been manifestly framed upon the English Statute 22 Geo. 3, cap. 45, which was passed, as it declares, "for further securing the freedom and independence of Parliament." If sections 6 and 7 of our Constitution Act do not by clear grammatical construction include the defendant under such circumstances, then he is not liable, and the demurrer must be over-ruled. Let us see how this stands. I shall limit my quotations to so much of the sections as relates to the Assembly, although the two branches of the Legislature are included in them. Section 6 enacts that

"Any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit upon his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being elected or of sitting or voting as a member of the Legislative Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same."

It is not disputed that this language is sufficiently large to include members who undertake contracts, as well as would-be members, and there is certainly nothing in it to exclude members. On the contrary, the language would very distinctly include them. The effect of this part of the section is simply this: "All contractors or persons interested in contracts are incapable of being elected, or if elected they are incapable of serving in Parliament." The persons disqualified are contractors, whether they are members or would-be members, and their disqualification is incapacity to "sit or vote," that, is, to "serve" in any way in Parliament whilst so disqualified. We then come to the words—

"and if any person being a member of such Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it his seat shall be declared by the Legislative Assembly to be void and thereupon the same shall become and be void accordingly."

Do these words restrain the previous words of disqualification? I think not. Their effect is this: "If a member enters into any such contract, or continues to hold it, being so disqualified, the Assembly shall declare his seat void." The intention is plain enough. It is to remove a disqualified person, and to give the constituency an opportunity of electing a member who is not disqualified from serving. This part of the section neither qualifies nor disqualifies the person, it merely requires the performance of a specific duty by the Assembly. The words "enter into any such contract or agreement or having entered into it shall continue to hold it," were intended probably to give a member who had entered into a contract an opportunity of giving it up, and to the Assembly a discretion under such circumstances not to declare the seat void, but they do not give to the member who is a contractor the right to sit and vote whilst he is so disqualified. If they do, all the mischief which the statute is intended to prevent might be wrought. And as to a trustee, there is nothing in the language of the 6th section which imports that he is not disqualified from serving in Parliament if he becomes a contractor for the public service, although he may have no beneficial interest in the contract. As a contractor he undertakes the burden of a contract —it is enough that he enters into the contract, which implies in law an obligation to perform it, and disqualifies him. The statute would be evaded in that way as easily as if he were to get someone to take the contract as a trustee for his own benefit. His vote might be subject to influence to obtain some advantage for those whom he represented. Many occasions and means of bringing corrupt influence to bear on trustee members can be imagined. It is enough, however, that the law enacts that the member shall not "enter into" any contract for or on account of the public service. I think, therefore, that the language of the Act disqualifies a trustee contractor from serving in Parliament. The proviso to section 6 gives no aid to the interpretation of the statute on the disputed points in this case. The disqualification is from serving in Parliament whilst he is a contractor, and the avoidance of the seat by the Assembly forms no part of that disqualification, which is personal. I must now examine section 7 of our Act, which gives the right of action for penalties. It enacts,—

"If any person by this Act disabled or declared to be incapable to sit or vote in the Legislative Assembly shall nevertheless be elected and returned as a member to serve in the said Assembly such election and return shall and may be declared by the said Assembly to be void and thereupon the same shall become and be void."

This part of the section clearly refers to the election and return of a disqualified person, and makes provision for vacating the election and return just as in section 6 provision had been made for avoiding the seat of a disqualified member. For the defendant it was contended that this part of section 7 limited the first part of section 6 to persons incapable of being elected, and excluded members from the disqualifying portion of that section. I can only say there is nothing in the language of the first part of section 7 which conveys any such limitation to my mind, or which I think could possibly convey it to any other mind. The first part of section 7 does not limit any other part of the Act, it only limits the duty of the Assembly to declaring the election and return of disqualified persons void. Nor would it change the position of a contracting member if the first part of section 7 did limit the first part of section 6. The remaining part of the 6th section disqualifies the member if he "enters" into any such contract, and does not make the avoidance of the seat a necessary part of the disqualification. It would be more important for the defence if it could be shown that the succeeding and concluding words of section 7 excluded, or were not wide enough to apply to, a disqualified member, or that the first part of the section excluded such person from the penal portion of it. The words I refer to are these,—

"And if any person under any of the disqualifications mentioned in the last preceding section [that is 6] shall whilst so disqualified presume to sit or vote as a member of the said Assembly such person shall forfeit the sum of five hundred pounds, to be recovered by any person who shall sue for the same in the Supreme Court of Queensland."

The penalty is thus recoverable from all persons, whether members duly elected or elected whilst disqualified, if whilst so disabled they presume to sit or vote as members. I think it means, by the use of the word "presume," that the person sitting or voting, and so subjecting himself to penalties, must do it "knowingly"—that is, must know that he is a contractor. And this would probably explain the intention of the Legislature in using the words "continue to hold" the contract as giving the member a time to disavow it. But is it a condition precedent to the right to sue in the case of a duly-elected member that the seat should be declared void? There is nothing in the Act which says so. It is enough that the person presumes to sit or vote whilst disqualified. If I could see that the avoidance of the seat was essential to disqualify the member from sitting or voting I must necessarily hold it to be a condition precedent to the right to sue, however absurd the conclusion might be so far as the Act is intended to secure the freedom and independence of Parliament, for then, all that a majority—secured by the dispensation of contracts amongst them—need do to fortify themselves against penal consequences, would be to refuse to declare void the seat of any one of them. There are two results of disqualification, the one a duty of the Assembly towards themselves and the electors, to declare the election and return or the seat to be void, the other a duty which any person may assume to sue for the penalty. This is intended to deter contractors from presuming to serve in Parliament whilst they may be subject to the influence of their employers. To hold that a member might at any time, whilst he was under contract with the Government for the public service, sit or vote in Parliament, unless we are forced by unavoidable interpretation of the statute to exclude him from its prohibition, would be to decide that our Legislature had omitted the main security for the freedom and independence of Parliament. It would be so much readier work and shorter to make contractors of members than members of contractors. If members are excluded from the operation of the statute, then those who are most likely to be subjected to temptation, who can most readily and easily give the desired support for the price offered, are left free to sell or barter their political honour and the freedom and independence of Parliament. The only answer I could get from counsel when I pressed for a reason for so singular an omission was that they could not say, except that it was so, and that a like immunity was extended to members in England. This is, however, a grave error. Nothing of the kind exists in England. I cannot think that our Legislature or the Imperial Parliament which authorised Her Majesty to assent to the Constitution Act made any such omission, even by accident. The meaning of the Act becomes more abundantly clear, to my mind, when I read the first part of section 6, which shows the persons who are to be affected by it, and the acts which they are prohibited from doing, and collate it with the latter part of section 7, which adds the penalty to these prohibitions. This is the recast:

"Any person who shall directly or indirectly undertake execute hold or enjoy any contract for or on account of the public service shall be incapable of being elected or of sitting or voting as a member of the said Legislative Assembly during the time he shall execute hold or enjoy any such contract. . . . and if any person under any of the disqualifications mentioned in the last preceding section shall while so disqualified presume to sit or vote as a member of the said Assembly such person shall forfeit the sum of £500 to be recovered by any person who shall sue for the same in the Supreme Court," &c.

The Act is thus complete so far as it is directe against the person of the contractor. But it is further necessary to deal with the election and return, or the seat, and the latter part of section 6 (without the proviso) recast with the first part of section 7, being the other portions of the two sections, which provide for the avoidance of the election or seat, read as follows:—

"And if any person being a member of the said Legislative Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it, his seat shall be declared by the said Legislative Assembly to be void and thereupon the same shall become and be void accordingly"—and—"if any person by this Act disabled or declared to be incapable to sit or vote in the Legislative Assembly shall nevertheless be elected and

returned to serve as a member such election and return shall and may be declared by the said Assembly to be void, and thereupon the same shall become and be void."

There is no confusion of the personal disqualifications with the duty of the Legislature to declare, not the disqualification, but the avoidance of the election or seat. The state of our law then would appear to be this:—All contractors are disqualified from serving in Parliament, and if they knowingly sit or vote whilst so disqualified they shall forfeit £500, to be recovered by any person who may sue for it, and the Assembly shall declare the election and return, or the seat, as the case may be, to be void. This conclusion will, I think, be confirmed by a comparison of our legislation with the English statute, 22 Geo. III., cap. 45, on the same subject. The framers of our Act endeavoured to follow the model of the English Constitution, certainly so far as it can be found in the statute law of the mother-country. Hence we have in our Constitution Act the very words of the great constitutional statutes of England, notably those relating to the incapacity of persons holding any office of profit under the Crown to serve in Parliament, the provision for the independence of the Judges, and, as we have seen, for securing the freedom and independence of Parliament; for the introduction of money votes by message from the Crown; for the protection of persons publishing the proceedings of the House, &c., &c. The 6th section of our Act is a digest using all the material words of the 1st, 2nd and 3rd sections of the statute of George. The disqualifying words are the same—the very same words being used nearly throughout. The 7th section of our Act is a digest of the 9th section of the same English statute which inflicts the penalty on all persons disabled or declared to be incapable who shall presume to sit or vote. It will be observed that the English statute declares the election and return, or the seat (as the case may be) of a contractor void, and throws no duty on the Legislature. The Colonial Act, as has been seen, requires the Legislature to declare the seat void. To meet this difference the Colonial Legislature has inflicted the penalties upon a contractor who shall presume to sit or vote "whilst under any of the disqualifications" in section 6; these words are not in the English statute, and they indicate, I think, that the avoidance of the seat is not a part of the disqualification, and is not a condition precedent to the right to sue. By section 10 of the English statute a contractor for the public service is forbidden to admit a member of the House of Commons to a share of his contract under a penalty of £500. This provision is omitted from our Constitution Act, which shows to my mind that the Legislature considered the first part of section 6 sufficient to extend its disqualifying effect to duly elected members as well as members elect who should endeavour to obtain public contracts by indirect agencies. The 6th section of the English statute, relating to persons on whom the completion of any contract should devolve by descent or limitation, or by marriage, or as devisee, legatee, executor, or administrator, shows that the general prohibitions of the law were deemed to extend to trustees and others in a fiduciary situation. Upon the whole, then, I think it is no defence on behalf of a contractor who presumes to sit or vote to say that he is a member, or a member whose seat has not been declared void, or a trustee having no beneficial interest in the contract, and the demurrer must be allowed. The first and third paragraphs may be matters of evidence in support of the second, which denies the authority. They ought not to have been pleaded, and on an application to the Judge they would probably have been struck out. We desire, however, to discourage attacks on matter of this kind by way of demurrer, and the paragraphs will stand upon this proceeding. The 4th and 6th paragraphs of the defence will go, unless the 4th can be treated as evidence of want of authority, which the pleader must determine at his own peril. The statement of claim was attacked upon the ground that it did not set forth that the defendant, when he sat and voted, "knew" that he was a contractor, but this objection is

disposed of by the averment in paragraph 4 of the claim that the owners of the ship (of whom the defendant is said to be one) authorised the entering into the charter-party or contract on their behalf.

HARDING, J. :—This case was argued before the Full Court on the 7th, 8th, and 9th of September, on the plaintiff's demurrer to the defendant's statement of defence. *Mr. Griffith, Q.C.*, and *Mr. Garrick* (*Mr. Rutledge* with them) argued for the plaintiff in support of the demurrer; *Mr. Pope Cooper* and *Mr. Real* appeared for the defendant in support of the defence. Incidentally, the question whether two counsel should be heard for each party on the trial of a demurrer arose I think two should be heard, as was done in this case. I also think that objections to statements in a pleading on the ground that such statements only amount to statements of evidence, and not of fact, should be taken on a summons to strike out such statements, and not by demurrer. The plaintiff sued the defendant in respect of alleged breaches by him of the Constitution Act of 1867, sections 6 and 7, and claims in respect thereof five penalties of £500 each, making in the whole £2,500. The plaintiff's allegation, as stated shortly, is that the defendant committed such breaches by reason of the existence of a contract made between him and the Government of this colony, whereunder or by means whereof he was liable to claim advantage or suffer disadvantage according as things might fall out on five days on which the defendant was a member of the Legislative Assembly of this colony and sat therein as a member thereof and voted therein. The plaintiff shows that this contract was entered into by the defendant through an agent, but he asserts that such agent was authorised by the defendant to enter into it on his behalf. The plaintiff further states facts which remove the defendant from the protection of the proviso in the 6th section of the Constitution Act of 1867. This being the case made against him, the defendant, as his defence, denies the alleged authority of the agent, and as a bar at law to the plaintiff's claim, sets up facts which go to show that (if he was bound by the contract) he had no beneficial interest thereunder, but was only a trustee for others, and asserts that his seat as a member of the Assembly has not been declared void by the Assembly. The plaintiff, having demurred to all the defendant's defence, except such part of it as denies the agent's authority, and the defendant having, on such demurrer, stated that the plaintiff's claim is bad in law, the following questions have been raised for our decision:—1. Is a trustee within the meaning of the 6th and 7th sections of the Constitution Act of 1867? 2. Is the avoidance of the seat by the Assembly a condition precedent to the liability to the penalty? 3. Ought the plaintiff to have charged the defendant with knowledge of the contract at the time he sat and voted as a member, and has he done so? The demurrer also raises two further grounds. They are aimed at the first and third paragraphs of the statement of defence, taking them apart from each other and the rest of the statement in the defence. These paragraphs contains statements explanatory of the defendant's denial of the agency, and as the evidence in their support may be admissible on the ground of denial, I do not think them tenable, at all events in the manner in which the matter at present comes up for our consideration. It may also be well to remark that the settlement in paragraph 4 of the statement of defence may possibly be used as evidence on the question of such denial. Each of these three question raises points of construction under the 5th and 7th sections of the Constitution Act of 1867. The sources of these sections are evidently the 1st, 2nd, and 9th sections of the English Act of 22 Geo. III., c. 45, intituled "An Act for restraining a person concerned in any contract, commission, or agreement made for the Public Service from being elected, or sitting and voting in the House of Commons," which were enacted in a consolidated form in the Constitution Act of New South Wales, sections 28 and 29 and subsequently in the Queensland Constitution Act of 1867, sections 6 and 7. But few cases decided on the English Act are to be found in the

reports. Two were mentioned during the argument of this demurrer—*Thompson v. Pearce, 1 Brod. & B., 25—3 Moore, 260. Royse v. Birley, L.R. 4 C.P., 296.* In the first case the object of the statute is (as it is perfectly clear on its face, and in its preamble, which states it to be an act for securing the freedom and independence of Parliament), pointed out by *Park, J.*, at page 84, "to be the prevention of an undue influence by means of contracts;" in the second case its highly penal nature is pointed out. Both of these cases were cases as to the avoidance of the election of a newly-elected member, and little assistance is to be gained from either of them on the first and second points. Were the first and second questions raised on the English Act, I think it is clear they would necessarily have to be answered—the first in the affirmative, and the second in the negative. Reading section 6, the person rendered incapable is a person "who directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account undertakes executes or enjoys in the whole or in part any contract or agreement for or on account of the Public Service." In other words, a person entering into a contract or taking the benefit of it. Again, reading the section further on, the person whose seat is to be declared void is any person who shall enter into such contract, so that in either of the cases provided for in this section the person aimed at is, at all events, the person entering into a contract—the actual contracting party. I say in either of the cases provided for in this section, because the 6th section clearly deals with the classes of persons. It deals with persons to be elected in future elections to the Legislative Assembly, and it also deals with persons who are in the Legislative Assembly at the time of their entering into the contract. It is asserted by the defendant that the avoidance of the seat by the Assembly is a condition precedent to the liability to the penalty. A fair means of testing this question is to ascertain whether the case of a member *in delicto* falls within the first part of section 6—

"Any person who shall directly or indirectly himself or by any person whatsoever in trust and for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being summoned or elected or of sitting or voting as a member of the Legislative Council or Legislative Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same."

and the latter part of section 7—

"And if any person under any of the disqualifications mentioned in the last preceding section shall whilst so disqualified presume to sit or vote as a member of the said Council or Assembly such person shall forfeit the sum of five hundred pounds to be recovered by any person who shall sue for the same in the Supreme Court of Queensland."

It clearly does, a member being a person who sits and votes. That this is a fair test is shown by the circumstance that the latter part of section 6—

"And if any person being a member of such Council or Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it his seat shall be declared by the said Legislative Council or the Legislative Assembly as the case may require to be void and thereupon the same shall become and be void accordingly."

(I omit the proviso to section 6, the case being outside it), and the first part of section 7—

"If any person by this Act disabled or declared to be incapable to sit or vote in the Legislative Council or Legislative Assembly shall nevertheless be summoned to the said Council or elected and returned as a member to serve in the said Assembly for any electoral district such summons or election and return shall and may be declared by the said Council and Assembly as the case may require to be void and thereupon the same shall become and be void to all intents and purposes whatsoever,"

is an alternative provision for the avoidance of the election and return and seat respectively by the Legislative Assembly, forming an additional or alternative security for enforcing the object of the Act. According, therefore, to my judgment, the right construction of these sections, with a view to the first and second points raised, is the following:—The person defined by section 6 under the words

"Any person who shall directly or indirectly by himself or by any person whatsoever in trust for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the "public service."

means a person or party to a contract or

agreement for or on account of the "public service." Whether he takes a beneficial interest or not, whether he is a person seeking election or is a member of the Legislative Assembly, the incapacity of such person as declared by such section is—if he is a person seeking election, an incapacity of being elected a member, or if elected, of sitting or voting; if he is a member, an incapacity of sitting or voting as a member of the Legislative Assembly. This incapacity continues during the time he shall execute hold or enjoy any such contract, &c. Each of these subjects of incapacity may be disqualifications, under the latter part of section 7. If it is shown that whilst such incapacity continues, such person has presumed to sit or vote as a member he becomes liable to the penalty. The liability may arise in the case of a person newly elected if he, being so incapacitated, proceeds on his election to sit and vote—in the case of a member if he, being so incapacitated, continues by virtue of his membership to sit and vote. This being so, such person so incapacitated being satisfied to submit to the penalty, could continue to sit and vote, or, under the words "during the time he shall execute hold or enjoy any such contract," he might possibly withdraw from sitting and voting, and thus avoid rendering himself liable to the penalty. The result of these events occurring seems to be that the colony, in the first case, might be injured by the vote of an incapacitated person in the Assembly: in the second case, by the loss of the benefit of the vote of one of its members. Should such a case occur, and possibly with a view to its prevention, the Act, in the first part of section 7, throws upon the Legislative Assembly the onus in the case of a person incapacitated from being elected of declaring his elections and return void; in the second part of section 6, the onus, in the case of a person being a member of such Assembly and incapacitated, of declaring his seat void; and by either of such sections, on such declaration, the avoidance is complete. Under this construction—which appears to be the natural and logical construction—an avoidance of the election and return, or of the seat, is not a condition precedent to the liability to the penalty incurred by the fact of a person, a member or not, sitting or voting. Notwithstanding that I have already stated the conclusion at which I have arrived, it may be well that I should refer to the arguments adduced by the defendant. From what I have said it will be seen that I consider that the 6th section is divisible into two branches—that its first branch is again divisible so as to cover the two cases of a person seeking election, on his being elected, and of a member sitting and voting, both being incapacitated. The defendant's contention is that the 6th section is only divisible into two branches; and to enforce his argument referring to the 7th section, he contends that the first part of that section as I have already read it. applies only to persons newly elected. As I have before pointed out, this would seem to be so. Again, were it not so, the latter part of the 6th section and the part of the 7th section to which I am now referring would have the same object—a construction which would result in the conclusion that the Legislature had enacted the same provision in the same Act twice in consecutive sections. I should not be inclined to arrive at this result until all other possible constructions had been exhausted. The defendant goes on to support this position—that the 6th section only comprises two branches—by arguing that since the first part of the 7th section is so limited in its application, the words "sit or vote" used therein apply only to persons seeking to be elected, and that such persons are consequently the persons only referred to in the first part of the 6th section—a sequence by no means necessary or imperative in construing the Act. There remains for consideration the third question—ought the plaintiff to have charged the defendant with knowledge of the contract at the time he sat and voted as a member, and has he done so? I think he has, by charging that the agent by whom the contract was entered into was authorised by the defendant to enter into it on his behalf. Whether or not such knowledge is material—which I think

it is—turns upon the words "shall whilst so disqualified *presume* to sit or vote as a member," in the latter part of the 7th section. Upon this question the case of *Royse v. Birley*, already referred to, seems to be an authority, and the observations of *Willes, J.*, at page 315, to be to the point. He there lays it down that the word "presume" seems to "imply not a mere ignorant act, but an act in which a person knowingly takes upon himself to do that which the law says shall not be done under the circumstances;" and, further, at page 305, he says: "Looking at the expression 'presume,' and at the highly penal nature of the latter section" (in the Queensland Act, section 7), "is not the case brought within the more general principle that a man is not to be guilty unless his mind concurs in his guilt?" Consequently should it turn out that the authority of the agent under whom the contract was entered into was general, and not special as charged, and that the defendant did not know that the contract had been entered into at the time he sat and voted, he will not have rendered himself liable to the penalty. The result of my judgment is that I find all the three points of law raised in favor of the plaintiff. The demurrer will therefore be allowed, with leave to either party to amend if and as he may be advised.

PRING, J.:—In this case the plaintiff seeks to recover from the defendant certain penalties under the provisions of sections 6 and 7 of the Constitution Act of 1867. The complaint set forth in the statement of claim is substantially that the defendant, whilst being a member of the Legislative Assembly of Queensland, entered into a contract or charter party with the Agent-General of Queensland for the conveyance of immigrants to Townsville, in the colony, in the British ship *Scottish Hero*, of which the defendant was part owner, and that whilst the contract or charter-party was in force the defendant sat and voted as a member in the Legislative Assembly. The contract or charter-party is set out in the statement of claim as made on or about the 23rd February, 1880, between the Agent-General of the colony of the one part and Andrew M'Ilwraith and Malcolm M'Eachern, trading as M'Ilwraith, M'Eachern & Co. (thereinafter referred to as party of the second part), for and on behalf of the owners of the British ship *Scottish Hero*, of the other part, and contains a number of clauses and conditions which it is unnecessary for me to refer to. The statement of defence appears to raise four distinct grounds of defence, which may be shortly stated as follows:—(1) Want of authority in McIlwraith, M'Eachern & Co., to contract on behalf of the owners of the *Scottish Hero*, and contrary to the express directions of the defendant. (2) That M'Ilwraith, M'Eachern & Co. had no authority from the defendant to use or employ the *Scottish Hero* in any contract with the Government of Queensland, for and on behalf of defendant. (3) Non-liability of defendant in consequence of his being at the time of the making of the contract a trustee under a marriage settlement, having no beneficial interest. (4) That defendant's seat has not been declared void by the Legislative Assembly, which it is alleged is a condition precedent to plaintiff's right of action. The plaintiff has demurred to the 1st, 3rd, 4th, and 6th paragraphs of the statement of defence which raises these several defences, except the first mentioned. I am of opinion that the matter contained in the first paragraph of the statement of defence was not intended to and does not raise an independent and distinct defence, and is not therefore open to the objection raised in the first ground of demurrer. I think the first paragraph should be read with the third paragraph (and probably was intended to be by the pleader), and in this view of the case it appears to me that the defence raised by these paragraphs is "want of authority" in M'Ilwraith, M'Eachern & Co. from the defendant to use or employ the *Scottish Hero* in any contract with the Government for or on behalf of the defendant. Taking the first and third paragraphs as raising such a defence, I think the demurrer to these paragraphs should be overruled. So far, however, as the third paragraph may be intended or considered to raise a defence of "*want*

of interest" in the defendant, I think the demurrer would be good. Although the facts set forth in the fourth paragraph of the statement of defence show that the defendant was only part owner of the *Scottish Hero* as trustee under a marriage settlement, with a very remote contingency of deriving any personal benefit; nevertheless, there is nothing in the language of the 6th section of the Act which would lead me to suppose that trustees, without any beneficial interest, were intended to be excluded. And, moreover, I think that the defendant, as trustee, must be deemed to have had *some interest in the contract* at any rate, without defining the nature of the interest. The demurrer therefore to this defence should, in my opinion, be upheld. The defence raised in the 6th paragraph of the statement of defence is, that a declaration by the Legislative Assembly that the defendant's seat as a member is void, is a condition precedent to the plaintiff's right to bring the action. This defence has also been demurred to, on the ground that the right of action under the Constitution Act of 1867 is not dependent upon a prior declaration of the Legislative Assembly. It was also contended by the defendant's counsel that the first part of section 6 of the Constitution Act applied only to persons seeking election, and did not include sitting members. The penalty provided by the latter part of section 7 of the Act attaches to any person who, being under any of the *disqualifications* mentioned in section 6, shall, *whilst so disqualified*, presume to sit or vote as a member of the Legislative Council or Assembly. It will, therefore, be necessary to determine whether a *sitting member* whose seat *shall* be declared void, if he enters into any such contract as is specified in section 6, can nevertheless sit and vote until his seat *has been* declared void without incurring the penalty provided by the 7th section for so doing? I am of opinion that he cannot. The disqualifying portion of section 6 appears to me to render *sitting members* incapable of sitting or voting, as well as persons who when elected are at that time disqualified. The language of section 6 is quite comprehensive enough to include each class of persons, and, indeed, the natural reading of this section would lead me to this conclusion. By the same section (6), if a sitting member enters into such a contract as specified in the preceding part of the section it is provided that his seat *shall* be declared by the Legislative Assembly to be void. If a sitting member, therefore, is not *thereby* disqualified, why should his seat be directed to be declared void? It is the disqualification itself which is the cause why the seat is directed to be declared void. A sitting member, therefore, being disqualified, comes within the penal portion of section 7 of the Act, and would be liable to the penalty imposed, if whilst being disqualified he presumed to sit or vote in the Legislative Assembly. Sections 6 and 7 of the Constitution Act of 1867 are the same as sections 28 and 29 of the Act of New South Wales, contained in the schedule of the Imperial Act 18, and 19 Vic., c. 54 (Pring's Statutes, vol. 1, p. 221), and these sections appear to have been framed on the Imperial Act, 28 Geo. III. c. 45. By this Act a sitting member of the House of Commons would under section 9 beliable to a penalty for *presuming* to sit or vote in the House of Commons whilst laboring under the same disqualification as provided by section 6 of the Queensland Constitution Act of 1867. The only difference I can see is that the seat of a member of the House of Commons is by the Imperial Act declared *void*, whilst the seat of a member of the Legislative Assembly of Queensland is by the Constitution Act of 1867 *directed* to be *declared* void by the Legislative Assembly. But this difference does not appear to me to affect the liability of the member to the penalty imposed by the Act which attaches on his presuming to sit or vote whilst being disqualified. I can discover no reason why a sitting member of the Legislative Assemby of Queensland should be in a better position than a member of the House of Commons when I find language sufficiently comprehensive in the Constitution Act of 1867 to include him. The demurrer, therefore, should be allowed, except as to so much of paragraphs 1 and 8 of the statement of defence as goes to show want of authority in M'Ilwraith,

M'Eachern, and Co., to enter into the contract on behalf of the defendant.

Solicitor for the plaintiff, *Chambers*.

Solicitor for the defendant, *Mein*.

BRISBANE CIVIL SITTINGS.

MILES *v.* M'ILWRAITH.

Aug. 22nd, 1881.

The pleadings having been amended, this action was tried before Harding, J., and a special jury of twelve.

The pleadings as amended were as follows:—

The statement of claim, after describing the parties and setting out the charter party, of the 23rd February, 1880, between the Agent-General, and M'Ilwraith, M'Eachern & Co., on behalf of the owners of the ship *Scottish Hero*, which was the cause of the action, states that:—

4. The said Agent-General and the said Andrew M'Ilwraith, and Malcolm Donald M'Eachern, were respectively authorised by the Government of the said colony, and the owners of the said ship to enter into, and did enter into the said contract or charter party as agents for and on behalf of the said Government, and the owners of the said ship respectively.

5. At the time of the making of the said contract or charter party, and thenceforward to the time of the commencement of this action, the defendant and Arthur Hunter Palmer, and Andrew M'Ilwraith, were registered as the joint owners of fourteen sixty-fourth shares in the said ship.

6. At the time of the making of the said contract or charter party, and thenceforward to the time of the commencement of this action, the total number of registered owners of the said ship, including the defendant and the said Arthur Hunter Palmer and the said Andrew M'Ilwraith, did not exceed fifteen.

7. In pursuance of the said charter party, the said ship sailed on the voyage therein mentioned, carrying emigrants for the said Government as therein stipulated.

8. On the 6th, 7th, 8th, 13th, and 14th days of July, 1880, while the said contract or charter party was in full force and effect, the defendant, knowing of the said contract or charter party, did, contrary to the provisions of "The Constitution Act of 1867," sit in the said Legislative Assembly as a member thereof, and vote therein, whereby and by force of the said statute the defendant for each and every such offence to wit on each and every of the aforesaid days, became liable to forfeit and forfeited the sum of £500 to the plaintiff.

9. All things have happened, all times have elapsed, and all things have been done, to entitle the plaintiff to recover from the defendant the said sums of £500 and each and every of them.

And the plaintiff claimed £2,500 forfeited by the defendant as aforesaid.

The defendant in his statement of defence, states that:—

1. The said contract or charter party in the claim mentioned, purporting to be made by the said Andrew M'Ilwraith, and Malcolm Donald M'Eachern, for, and on behalf of the owners of the ship *Scottish Hero*, if it ever was made, (which defendant does not admit) was so made without authority from the owners of the said ship, and contrary to the express directions of the defendant. And the defendant says that the said Andrew M'Ilwraith and Malcolm Donald M'Eachern were not, nor was either of them authorised by the owners of the said ship, or by the defendant, to enter into the said contract or charter party, or any contract or charter party with the Government of Queensland, for and on behalf of the owners of the said ship *Scottish Hero*, or of the defendant.

2. The defendant admits that he did sit and vote in the said Legislative Assembly on the days in paragraph 8 of the claim mentioned, but he does not admit that he did so sit and vote knowing of the said contract or charter party, or contrary to the provisions of the "Constitution Act of 1867." And he says, that before the days, or any of the days or times in the said paragraph mentioned—to wit, before the 6th day of July, 1880, the voyage in the said contract or charter party and

in paragraph 7 of the claim mentioned had terminated, and that the emigrants carried by the said ship had been landed with their luggage at Townsville, in accordance with the provisions of the said charter party; and that all the stipulations and conditions in the said contract or charter party contained to be performed by the party thereto of the second part, and by the owners of the said ship *Scottish Hero*, had been faithfully performed and completed, and that such performance and completion has been accepted by the Government of Queensland as and for a due performance of the said contract or charter party, but the said Government had not paid the second moiety of the passage money payable under the same. Save as aforesaid, the defendant does not admit that on the days or any of the days or times in the said paragraph 8 of the claim mentioned, the said contract or charter party therein mentioned, was in full or in any force or effect, and does not admit any of the allegations in the said paragraph 8 or in paragraph 9 of the claim contained.

On this statement of defence the plaintiff joined issue.

Griffith, Q.C., Garrick, Q.C., and *Rutledge* appeared for the plaintiff; *P. A. Cooper (Attorney-General)* and *Real* appeared for the defendant.

On the evidence educed, the Judge left the following questions to the jury, to which questions the jury returned the following answers :—

1. Did Andrew M'Ilwraith and Malcolm Donald McEachern, trading as M'Ilwraith, M'Eachern and Co., make the charter party purporting to make it for and on behalf of the owners of the Scottish Hero?—Yes.

2. Was it so made without authority from the owners of the said ship?—No.

3. Was it so made contrary to the express directions of the defendant;—Yes.

4. Had Andrew M'Ilwraith and Malcolm Donald M'Eachern, or either of them, authority from the owners of the said ship to enter into the said charter party with the Government of Queensland for and on behalf of the owners of the ship?—Yes.

5. Was it so made without the express authority of the defendant to do so?—Yes.

6. Were M'Ilwraith, M'Eachern and Co., the general agents of the defendant to enter into charter parties?—Yes.

7. Did the defendant on the 6th, 7th, 8th, 13th and 14th days of July, 1880, or on any and which of them, sit and vote, knowing of the said charter party?—Yes, as a matter of fact, on the 13th and 14th July, 1880: but we do not know whether the defendant knew the legal effects of the charter party.

8. Did the defendant on such days, or any and which of them, *presume* to sit, and vote, knowing of the said charter party?—Yes, as a matter of fact, on the 13th and 14th July, 1880; but there is no evidence that he sat and voted presumptuously.

9. Before those days, or any and which of them, had the voyage in the said charter party mentioned terminated?—Yes, before the 6th July, 1880.

10. Before such days, or any and which of them, had the emigrants carried by the said ship been landed with their luggage at Townsville, in accordance with the provisions of the charter party?—Yes, before the 6th July, 1880, so far as the landing is concerned.

11. Before such days, or any and which of them, had all the stipulations of the charter party to be performed by the party thereto of the second part been performed?—No.

12. Before such days, or any and which of them, had all the stipulations of the charter party to be performed by the owners been performed?—No.

13. Before such days, or any or which of them, had such performance been accepted by the Government as due performance of the contract?—No evidence to show.

14. Were the contractors entitled to demand the second moiety before such days, or any and which of them?—No.

15. Assuming that the charter party had not been performed before such days, or any and which of them, did the defendant on those days, or any and which of them, sit and vote knowing of the said charter party?—Yes, as a matter of fact, on the 13th and 14th July, 1880; but we do not know whether the defendant knew of the legal effects of the charter party.

16. Assuming that the charter party had not been performed before such days, or any and which of them, did the defendant on those days, or any or which of them, *presume* to sit and vote knowing of the said charter party?—Yes, as a matter of fact.

After the jury had found their answers to these questions, a further question was left to them—

On the 13th and 14th July, 1880, at the times mentioned in questions 7 and 15, did the defendant know the actual contents of the charter party?

In answer to which they stated that there was not sufficient evidence to show.

On the findings of the jury, the Judge entered a verdict for the defendant.

FULL COURT.

MILES *v.* M'ILWRAITH.

September 6th, 1881.

The word "*presume*" in the 7th section of the "Constitution Act of 1867," implies a certain state of mind, viz:—that the sitting or voting must be done with knowledge of the fact that the party so sitting or voting was a contractor under an obligation binding upon him.

And therefore a person bringing an action under section 7 of the statute must shew by satisfactory evidence that the party against whom the action is brought had the knowledge that he was bringing himself within the meshes of the statute.

Griffith, Q.C., *Garrick, Q.C.*, and *Rutledge* now moved for a rule *nisi* to enter judgment for the plaintiff for £1,000, or in the alternative to set aside the judgment and the findings of the jury in answer to questions 7, 8, 15 and 16, and for a new trial on those issues on the ground of misdirection.

Griffith, Q.C., submitted that the 3rd question was immaterial, and he cited *Smith v. McGuire, 3 H. & N. 554*, to show that it was enough that the jury had found that the contract was made in accordance with a general authority. The jury found that at the time the defendant sat and voted there was a binding contract between the defendant and the Government, but they discriminate between the days and say that he did not know of the contract on the first three days, but that he did on the last two. As to the question of the termination of the contract before the defendant sat and voted, the jury found that the stipulations of the charter party had not been completed, and that the contractors were not entitled to be paid the second moiety of the passage money. He submitted that the question narrowed itself down to the finding of the jury as to the knowledge of the charter party, and that on a motion for judgment, that finding was all that was necessary, the rest immaterial. Then there is the part as to the legal effect, that would depend upon the nature of the knowledge, in other words, what is the kind of knowledge necessary? The learned judge had said at the trial that it was necessary to show that the defendant had actual knowledge of the charter party, that he must have intended knowingly to commit the offence, that "presume" in the statute meant "knowing of and intending the consequences," that if the defendant was ignorant of the effect of the document, his ignorance was to be considered by the jury in determining whether sitting and voting was accompanied by the intention necessary to constitute the offence with such a discretion as that he (Mr. Griffith) submitted that the verdict must always be for the defendant. He had asked the judge to direct the jury in this way, to add "that the defendant must have had actual knowledge of the charter party, or that he must have had his attention called to it in such a way as to attract the attention of a reasonable man." He had also submitted to the judge that the proper direction would have been that if the defendant, when he sat and voted, knew of the charter party, or had means of knowing of it, or had his attention called to it, and wilfully shut his eyes, or voted recklessly or defiantly, he *presumed* to sit or vote within the meaning of the statute. He then read His Honor's summing up from the short-hand notes taken at the trial and commented on portions of it. He submitted that all that it was necessary for the plaintiff to prove was the existence of a binding contract, and the defendant's knowledge of it as a matter of fact, and in support of his arguments he cited:—*Royse v. Birley, L.R. 4 C. P., 296* (dictum of Willes, J., p. 815); *Davies v. Harvey, L.R. 9 Q.B., 433, 438; The Queen v. Stephens, L.R. 1 Q.B., 702; The Queen v. Prince, L.R. 2 C.C.R., 154* (late leading case on *mens rea*). *The King v. Marsh, 2 B. & C., 717; Twycross v. Grant, 2 C.P.D. 469* (Lord Cockburn's judgment, p. 541). He also read from *Stephen's Digest of the Criminal Law, Art. 33.*

As to the amount of the penalty, he submitted that section 7 of our Act should be construed in the same way as the corresponding section of the English Act, and that the amount of the penalty is £500 for each day the defendant sat and voted, and in support of this he cited from *Paley, p. 271; R. v. Waterhouse, 7 Q.B., 545.* Their Honors seemed however to be of a contrary opinion.

Lilley, C.J.:—In this case, which was tried before Mr. Justice Harding on the 22nd August and following days, and in which a number of specific issues were found by the jury, and judgment was entered upon them by the learned judge for the defendant, Mr. Griffith has moved the court for a rule *nisi*, calling upon the defendant to show cause why judgment should not be entered for the plaintiff for £1,000 on the findings of the jury; or why, in the alternative, the judgment for the defendant should not be set aside, and the findings of the jury in answer to questions 7, 8, 15, and 16 be also set aside, and a new trial had on those issues, on the ground of misdirection on the part of the learned judge. As to the first part of the motion—for leave to enter judgment for the plaintiff instead of for the defendant on the findings of the jury—we (for I am giving the judgment of the court) think that the plaintiff has failed to show sufficient grounds for a rule. When the demurrer was argued before the court some months ago, I intimated my opinion—and my learned brother Harding also concurred—that before penalties can be recovered against a defendant in an action of this kind under this statute, it must be shown that he did the act complained of with knowledge. That has been decided upon the English statute, which is the prototype of our Constitution Act upon this particular subject. The action is founded on the 7th section of our Constitution Act. Now by the 6th section the mere fact of a man being a contractor with the Government, whether with or without his knowledge, disqualifies him from sitting in the House, at all events renders his seat subject to be avoided by the Legislature itself. No personal consequences are imposed upon him by this section; but by the 7th section certain penalties are imposed if, being so disqualified, he presumes to sit or vote. It is now the unanimous judgment of the court that the word "presume" in the 7th section of the Act implies a condition of mind—a certain state of mind. We think that it implies that the sitting or voting was done with the knowledge of the fact that the party so sitting or voting was a contractor under an obligation binding upon him. I have said that the English courts have held, under their statute, that the word "presume" means to act with knowledge; and, in addition to the word "presume" the preamble of the English statute plainly intimates that the word "presume" has relation to a particular state of mind, because the statute is described as one "to further secure the freedom and independence of Parliament." The meaning is clearly this—that a man who is a contractor with the Government is presumed by law to be most likely in that frame of mind in relation to the Government which would interfere with the free and unbiassed exercise of his functions in Parliament. Seeing that our statute is based so particularly on the English statute on this subject, I think it is not unreasonable to assume that the reason which induced the Legislature of Great Britain to pass this statute was potent in the mind of the Legislature of New South Wales when it framed this Constitution Act, and that the same motive continued to operate on the mind of our own Legislature when it revised and consolidated the statutes and passed the Constitution Act of 1867, upon which this action is founded. Well then, the statute requiring that a man sitting or voting who is a contractor must know that he is a contractor under a binding obligation, throws, I think, the burden of proof upon the plaintiff. He must show, by at least satisfactory evidence, that the party against whom the action is brought, and who is said to have broken the law, had the knowledge that he was bringing himself within the meshes of the statute. There is no complaint here that the findings of the jury are not in accordance with the evidence, or in any way opposed to it. We must take it, therefore, that the findings are true, and in accordance with the evidence offered on the part of the plaintiff. It is necessary now to examine the questions and the answers given by the jury, because upon this branch of the application Mr. Griffith was at liberty to refer to the whole of the questions and answers, and in like manner we must examine them with a view to see whether his application is well founded. Now the first question is as follows:—

"Did Andrew M'Ilwraith and Malcolm Donald M'Eachern, trading as M'Ilwraith, M'Eachern & Co, make the charter party, purporting to make it for and on behalf of the owners of the *Scottish Hero*?"

As to that there can be no doubt. They did assume to make the contract, and the jury answered that "Yes."

"Was it so made without authority from the owners of the said ship?—No."

There was a general authority. So far there was no serious contention, and we may assume it to be a fact that there was a contract which was binding. There is no dispute that these answers are accepted by both sides, and that a contract was made which was binding. By the 7th, 8th, 15th and 16th questions the point of knowledge was particularly raised. The first of these (the 7th) is—

"Did the defendant on the 6th, 7th, 8th, 13th, and 14th days of July, 1880, or on any and which of them, sit and vote, knowing of the said charter party?"

Now the answer of the jury to that is—

"Yes, as a matter of fact, on the 13th and 14th July, 1880; but we do not know whether the defendant knew the legal effects of the charter party."

As I read that answer, the jury say he knew there was, on the 13th and 14th, as a matter of dry fact, a charter party in existence, purporting to be made between M'Ilwraith, M'Eachern & Co. and the owners and the Government. I may say at once if the defendant had known the substance of the charter party—that it was binding upon him as a matter of fact, and he regarded it as not binding upon him in law, he would be bound. His ignorance of the law and the legal effect of the charter party would not in any way save him. Then as to the 8th question:—

"Did the defendant on such days, or any and which of them, *presume* to sit and vote, knowing of the said charter party?—Yes, as a matter of fact, on the 13th and 14th July, 1880; but there is no evidence that he sat and voted presumptuously."

Taking the direction of the learned judge as to what the word "presume" would mean—actual knowledge—the jury declined to say that he sat and voted with actual knowledge; but that he knew the dry fact that there was in existence a charter party purporting to have been made between M'Ilwraith, M'Eachern & Co. and the owners and the Government. Then the 15th—

"Assuming that the charter party had not been performed before such days, or any and which of them, did the defendant on those days, or any and which of them, sit and vote knowing of the said charter party?—Yes, as a matter of fact, on the 13th and 14th July, 1880; but we do not know whether the defendant knew of the legal effects of the charter party."

My brother Harding reminds me that the necessity for this question did not arise, because it was based upon an assumption not sufficiently founded. Then the 16th is based on a like assumption, and the answer to that is to a like effect. The jury, in fact, declined to say that the evidence justified them in finding that the defendant knew he was a contractor bound to the Government by a binding obligation. That would be almost sufficient, in itself, to justify the learned judge in finding that the party upon whom the burden of proof fell by law had failed to make out his case. But the jury had a further question put to them; and it seems to me, taking their answer to that with those I have just read, that they negatived the imputation of actual knowledge. I must now go to the third question which is this—"Was it so made"—that is, was it made purporting to have been made for and on behalf of the owners—"contrary to the express directions of the defendant?—Yes." Then 5—

"Was it so made without the express authority of the defendant so to do?—Yes."

Then there is the additional question to which I have referred—

"On the 13th and 14th July, 1880, at the times mentioned in questions 7 and 15, did the defendant know the actual contents of the charter party?—

which the jury said there was not sufficient evidence to enable them to answer. Now the burden of proof being upon the plaintiff, it was for him to give them sufficient evidence to justify them in answering it one way or the other—in his favor, if he is to have the verdict. He must show that the defendant had knowledge so as to bring him within the penalty imposed by the enactment. For these reasons I think that, upon the first ground, the rule must be refused. The judgment for the defendant will not be disturbed. As to

the second point:—that the findings in answer to questions 7, 8, 15, and 16 be set aside and a new trial granted on those issues—it seems to me that it would be idle to grant a new trial—I think Mr. Griffith conceded that—if we are right that there is a failure of proof upon an essential part of the case—namely, the knowledge of the defendant at the time he sat and voted. As long as the answers to 8, 5, and the additional question stand, a new trial would be inconsistent and absurd, and upon these grounds the rule must be refused.

Harding, J.: His Honour's judgment is the judgment of the court, and I concur in it entirely.

Pring, J., also concurred.

Rule refused.

Solicitor for plaintiff, *Chambers*.

September 6th, 1881.

PERKINS *v.* "THE EVANGELICAL STANDARD."

The discussion of the public acts of public men is *primâ facie* privileged unless it exceeds the bounds of fair comment. It is for the jury to say whether such discussion has or has not exceeded the bounds of fair comment.

This was an action of libel tried before Mr. Justice Harding and a jury of four, on the 25th and 26th of August. The libel complained of was a letter written in the *Evangelical Standard* signed "Truth," and headed "Mr. Weld-Blundell at Copperfield." The portion of the article complained of was as follows:—"Pat Perkins, a thorough bigot and disciple of James O'Quinn. The sooner the colony is rid of such creatures, the better for morality and religion."

Judgment was given for the plaintiff for £1 in addition to £2 paid into Court, and costs.

Griffith, Q.C., and *Rutledge*, moved for a rule *nisi* to set aside the judgment, and enter judgment for a nonsuit, or for the defendant. The article in question being a comment on the public acts of public men is privileged, and the onus falls upon the plaintiff to show express malice, *i.e.*, actual spite, or ill-will. There was no evidence of that, and the case ought never have gone to the jury. The article to show actual spite must be more consistent with the existence of ill-will, than with its non-existence.

Cases cited, *Sommerville v. Hawkins, 10 C. B., 583; Spilt v. Maule, L.R., 4 Ex. 232; Laughton v. Bishop of Sodor and Man, L.R., 4 P. C., 495; Clark v. Molyneux, L.R., 3 Q. B. D. 237.*

Lilley, C.J.:—The question for the jury here, and it is not disputed that it was left to them with the proper direction on the part of the judge, was—whether the defendant had exceeded the right which every man in the community has to make a fair comment upon the public acts of public men. We must take it that the judge directed them accurately as to the effect of their findings—that the defendant had exceeded the right, had gone beyond the lines of fair comment—that being so, the words were left to the jury for their determination. We must take it that they have found that the language was more consistent with indirect or wrong feeling than with its absence. I am of opinion also, that there was sufficient in the defamatory matter to go to the jury, and that it was properly left to them. That being so, I think there ought to be no rule.

Pring, J.:—It appears the case was left to the jury either with or without the evidence of Mr. King and Mr. O'Carroll. They were quite at liberty to take their own interpretation of the article. The summing up has not been disputed, and the jury found that, while there was a privilege in discussing the public acts of public men, that the defendant in this case had exceeded that privilege.

Harding, J.: Concurred.

Rule refused.

Solicitor for defendant, *Mein*.

September 7th, 1881.

JENSEN *v.* PUGH AND ANOTHER.

Inclosed Lands Act, sections 1 and 6 (18 Vict., No. 27).

Trespass under section 1 of 18 Vict., No. 27 *(Inclosed Lands Act)* will not lie where the owner of the lands has inclosed the property of another with his own. In such a case the boundaries, under section 6, are not sufficiently defined as to be known or recognized.

The appellant was prosecuted before the Police Magistrate of Rockhampton (Pugh), by one William Hick, under section 1 of the *Inclosed Lands*

Act, for an alleged trespass on his inclosed land. On the 14th July, 1881, the said Police Magistrate fined the appellant, or in default, 14 days imprisonment. From the evidence taken before the Police Magistrate, it appeared that the said William Hick had fenced in with his land (*i.e.*, the place where the alleged trespass occurred) a portion of the public highway, and lands belonging to others.

His Honor the Chief Justice granted a rule *nisi* for a prohibition on the following grounds:—

(1) That the said Police Magistrate had no jurisdiction to adjudicate upon the case, inasmuch as the said Jensen (appellant) set up and asserted a *bonâ fide* claim of right.

(2) That the evidence does not show that any offence against the statute, 18 Vic. No. 27, under which the information against the said Jensen was laid, was committed.

Power moved the rule absolute; *Chubb* showed cause on behalf of Hick.

The Court held that the said William Hick having failed to comply with the statute, which required that his fence should correctly define the boundaries of his land, whereas his fence had comprised the lands of others, could not take advantage of the Act.

Rule made absolute, costs against William Hick.

Solicitor for appellant, *Chambers*; agent for *Lyons*, of Rockhampton.

Solicitors for respondent Hick, *Rees R. Jones & Brown*, Brisbane and Rockhampton.

September 7th, 1881.

QUEENSLAND NATIONAL BANK LIMITED *v.* MUNICIPAL COUNCIL OF ROCKHAMPTON.

Local Government Act of 1878, section 177.

In computing the net annual of value property under the 177th section of the *Local Government Act of 1878*, the fair capital value of the same should be taken into consideration.

This was a special case stated for the opinion of the Full Court, under the 186th section of the *Local Government Act of 1878*. The Municipal Council of Rockhampton (the appellants here) caused a valuation to be made of the property on which the Queensland National Bank at Rockhampton stands, and of which such Banking Company are owners, and the same was computed at the net annual value of £500. The Bank appealed to the justices of peace constituted to hear such appeals, and the said justices reduced the valuation from £500 to £375. The said justices, on hearing the appeal, refused to hear any evidence as to the fair capital value of the land on the ground that, the land being occupied, the first proviso in the said 177th section, namely—

"Provided that no rateable property shall be computed as of an annual value of less than eight pounds per centum upon the fair capital value of the fee simple thereof"

did not apply, and that they had nothing to do with the fair capital value of the fee simple in deciding the annual value thereof. The questions for the consideration of the court were:—

1. Whether the justices were right in holding that they had nothing to do with the fair capital value of the fee simple of the said land and buildings on the ground that the said land being occupied and being all built on and improved to the fullest extent the said proviso did not apply.

2. Whether the justices were right in refusing to hear evidence as to the fair capital value of the fee simple of the said land and buildings.

Garrick, Q.C., and *Power*, for the appellants. The respondents did not appear.

The Court sustained the appeal, saying that the questions should be answered in the negative, that the justices were not right as therein asked. The form of order to include a hearing *de novo*, seven days' notice of re-hearing to be given to the Bank. The respondents to pay the costs of this appeal.

Solicitors for the appellants, *Rees R. Jones & Brown*, Brisbane and Rockhampton.

FULL COURT.

October 11th, 1881.

IN RE CHRISTOPHER WILSON, AN INSOLVENT.

Insolvency Act of 1874, ss. 94, 105, 123, 124, 157.

The creditors may allow the trustee of an insolvent estate to go out of the colonies to realise the estate, and may grant him his expenses incurred therein, if it be expedient that he should do so.

THIS was an appeal from a decision of Mr. Justice Pring. The facts of the case are clearly and sufficiently set out in the judgment, which is as follows:—

This was an application to me, sitting in Chambers as the Court in its Insolvency Jurisdiction, made by way of motion on notice, and came on for hearing on Wednesday, the 28th September, 1881, when I reserved my decision. The following note of motion on behalf of the above-named insolvent was duly filed on the 14th September:—

1. That the Court do order the Trustee of the property of the abovenamed Insolvent to bring in his accounts in detail for investigation.

2. That the item appearing in the Trustee's Estate Book, of £120, "trustee's commission," be reduced to £60.

3. That the Trustee's expenses for proceeding to England in connection with this estate, and charged for as amounting to the sum of £376 9s. 6d., be disallowed, or, in the alternative, be reduced to such an amount as the Court shall think reasonable.

4. That the following items appearing in the Trustee's Estate Book be disallowed:—

Exchange on draft on England - -	£ 2	0	0
Stamp - - - - - - - - -	0	8	0
Telegrams, £1 1s. Postages, 10s. 6d. -	1	11	6
Discount and stamp on draft, £400 -	2	8	6
Commission, 5 ℘ cent. on advance, £500	25	0	0
Interest on £500, 218 days - - -	26	17	4

5. That the said Trustee be ordered to pay to the said Insolvent or his Solicitors the balance of the moneys in his possession or control.

6. And that the said Trustee be ordered to pay costs.

I gather from the documentary evidence produced by the trustee and read at the hearing, that Christopher Wilson was adjudicated insolvent, on his own petition, on the 12th March, 1880, and that Henry Parker was duly appointed creditors' trustee on the 23rd March, 1880, at a remuneration of £10 per cent. on the assets realised. The debts proved and allowed amounted to £381 6s. 7d. The insolvent appears to have failed to set forth in his statement of affairs that he had any beneficial interest, or that he was in any way interested under the will of his late father, but the trustee, after some time had elapsed, discovered that the insolvent (besides being otherwise so interested) was entitled under the will to a reversionary interest, consisting of a one-seventh share of £16,000, on his mother's death. A general meeting of creditors was held on the 23rd November, 1880, when the following resolutions were unanimously agreed to:—

1. That the trustee be authorised to proceed to England for the purpose of collecting the moneys payable to the insolvent under the will of his father, the late Christopher Wilson, and that he be instructed to apply to the Supreme Court for the necessary permission to leave the colony for that purpose.

2. That the insolvent be requested to give to the trustee a power of attorney in such form as the trustee's solicitor may approve, empowering him to collect moneys in England and give valid receipts therefor.

3. That in the event of the trustee recovering any moneys in England he be allowed all necessary travelling and legal expenses.

The trustee accordingly left Brisbane for England on or about the 20th of December last, and succeeded, on or about the 9th of May last, in selling the reversionary interest mentioned for £1,200, and returned to Brisbane on or about the 15th July last. On his return he paid the creditors 20s. in the £, and interest, the latter item amounting to £40 9s. 9d. After his arrival in Brisbane, namely, on the 4th August last, another meeting of creditors was held, at which the trustee reported the sale of the reversionary interest in question, after experiencing considerable difficulty and delay, and that as the sum realised—namely, £1,200—was sufficient to pay the creditors in full, with interest and expenses, he had abstained from realising any further of the insolvent's interests, and had at once returned to the colony. He further reported to the meeting that he had incurred, for solicitor's expenses and auctioneer's charges, the sums of £64 4s. 2d. and £24 4s., respectively, for which he produced vouchers. He stated that he proposed to charge for his expenses to London and back, £376 9s. 6d., being cost of

passage money and £1 1s. per diem for expenses from the 21st December, 1880, the date of his departure from Queensland, to the 14th July, 1881, the date of his return.

At this meeting it was unanimously resolved:—

1.—That the creditors approve and confirm the action of the trustee and express their approval of the expeditious and highly satisfactory manner in which he carried out the object of his mission to England, and that the charge of £376 9s. 6d., for expenses to and from England, be allowed; and 2.—That the trustee be authorised to bring the insolvency to a close and apply for his release forthwith.

At a general meeting of creditors held on the 16th September, 1881, the trustee laid before the creditors assembled an account showing the manner in which the insolvency had been conducted by him, with the list required by the 197th section of *The Insolvency Act of 1874*, and informed the meeting that he proposed to apply to the Court for a release on the 28th day of September. The trustee also laid before the meeting a report, dated 26th August, 1881, of the Accountant in Insolvency upon the trustee's accounts and his general conduct of the insolvency. The following resolutions were then unanimously carried:—

1. That the account laid before the meeting by the trustee is satisfactory.

2. That the charges made by the trustee for his services and otherwise are reasonable and proper.

3. That the manner in which the insolvency has been conducted by the trustee has been highly satisfactory, and—

4. That the meeting approves of the trustee applying to the court for his release.

Affidavits of the insolvent, and Newman James Row Wilson, of the firm of Wilson and Wilson, solicitors for the insolvent, respectively, were read in support of the motion, and affidavits of Henry Parker (the trustee) and James Butterfield respectively, were read on behalf of the trustee. An affidavit of the insolvent in reply was also read.

Mr. Griffith, Q.C., contended:—

1. That the trustee could not make any charges against the insolvent estate for travelling out of the colony on business connected with the administering of such estate. (2) That the allowance made and approved of by the creditors was not in this case at all reasonable. (3) That the creditors cannot authorise such a charge. (4) That the creditors cannot authorise such a charge after they had been paid in full. The learned counsel quoted *Ex parte Joyner, in the matter of Sharpe, 2 Montague & Ayrton, 1*, and further contended that the business on which the trustee was engaged was not reasonable.

Mr. Garrick, Q.C., referred me to the 92nd, 123rd and 124th sections of *The Insolvency Act of 1874*, and also to the case of *Ex parte Lovegrove, 2 Montague & Ayrton, 4*, and also to *Ex parte Shaw, in the matter of Robinns De Gex's Bankruptcy Cases 242*, and the judgment, page *252*.

In the absence of any charge of fraud against the trustee, and considering the provisions of *The Insolvency Act of 1874* as to the management of insolvent estates, I doubt whether the court has power to make the order asked for on the first portion of the note of motion. No such charge has been made against the trustee by the insolvent. The resolutions passed by the creditors at the meeting held on the 16th September, 1881, are highly satisfactory as to the management of the estate by the trustee. The solicitor for the insolvent has had no impediment that I can discover thrown in his way in investigating the accounts in the interest of the insolvent. The trustee will not therefore be ordered to *bring in his accounts in detail for investigation*. I pass on to the consideration of the third portion of the note of motion, as Mr. Griffith withdrew from my consideration the second portion. If it was actually necessary for the due and beneficial administration of the insolvent estate that the trustee should journey to England for the purpose of realising assets of the insolvent in that country and the creditors by resolution authorised him to do so, I know of no authority against such a course of proceedings being adopted and followed out by the trustee, and if he undertook the journey in question *solely* and *for the benefit of the estate* I think he would be entitled to be allowed all reasonable travelling expenses *expressly* incurred on that account.

I find after a careful consideration of the evidence that unless the trustee had proceeded to England it is more than probable that the realisation of the assets in question would have been postponed for a lengthened period at great expense and might perhaps never have been effected. I find also that the trustee undertook the journey at the request of the creditors and *solely* for the benefit of the estate and that he did not transact any other business whilst in England, and I also find that the amount allowed by the creditors in respect of such journey, namely £376 9s. 6d., was reasonable. Mr. Griffith contended that the creditors could not authorise such a charge, but I fail to see why they could not. By the 157th section of *The Insolvency Act of 1874* the insolvent is entitled to any surplus remaining after payment of his debts with interest at the prescribed rate and of the *costs*, *charges*, and *expenses* of the insolvency.

If it was for the benefit of the estate (and I have decided that it was,) that the journey should be made and expenses incurred, such expenses would be borne by the estate; and by the 123rd section of the Act it is provided that the trustee shall, in the administration of the property of the insolvent, have regard to any *directions* that may be given by resolution of the creditors at any general meeting, &c. With regard to Mr. Griffith's last objection, that the creditors could not authorise such a charge after they had been paid in full, it appears to me that according to the facts they did not do so. Considering all the circumstances of the case, and the terms of the third resolution of the 23rd November, 1880, I disallow all the items specified in the fourth portion of the note of motion. I decline to order the trustee to pay to the insolvent or his solicitor the balance of the moneys in his possession or control, as there is no evidence that I am aware of that he has refused to do so when the actual balance has been ascertained.

I make no order as to costs. The order of the court will be drawn up in terms of this judgment.

Griffith Q.C., for the appellant, Christopher Wilson;—

The trustee's trip to England to realise the insolvent's estate was unreasonable. The business could clearly have been done through an agent; for an attorney, with the papers of the trustee's appointment properly authenticated, could have done everything *Re Davidson's Settlement Trust, L.R. 15 Eq., 383; Ex parte Joyner, 2 M. & A., 1: Ex parte Shaw De Gex, 242.* The trustee's step, in going to England, was most unreasonable, and could only be held justifiable through ignorance of the law, which could not possibly have been the case here. The trustee, according to his own affidavit, went to England for reasons other than the realisation of the insolvent's estate. And further, that the amount allowed was an unreasonable one, and ought to be reduced.

Garrick, Q.C., for the trustee, cited ss. 123, 124, 105, 157, 135, of the Insolvency Act.

The Court were of opinion that in this case it was expedient that the trustee should go to England; and that the expenses allowed him, viz.:— a guinea a day and passage money, were fair and reasonable. The appeal was accordingly dismissed, costs to be paid out of the estate.

Solicitors for appellant, *Wilson & Wilson.*

Solicitor for respondent, *Mein.*

IN CHAMBERS.

Pring, J. September 2nd, 1881.

IN THE MATTER OF ERNEST HENRY ROOK, AN INSOLVENT. EX PARTE CROSBY.

General Rules in Insolvency (1874)—Rule 58.

The time prescribed by No. 58 of the General Rules in Insolvency (1874) for appealing against any decision of the trustee in respect of a proof of debt may be enlarged by the Court by modification of its own rules.

In this case Crosby claimed to prove in the estate of Ernest Henry Rook, on a promissory note for £93 8s. 5d.; such proof however was disallowed by the trustee, Landy.

Griffith, Q.C. now appeared on behalf of the claimant, and applied for a reversal of the trustee's decision. The time for appeal prescribed by rule 58 having elapsed, he first applied for an extension of time in which to appeal, and in support

of such application he contended that the Court had power to extend the time by way of modification of its own rules, and he cited the following cases :—*Burke v. Rooney, L.R., 4 C.P.D. 226; Ex parte Kiveton Coal Co., L.R., 7, Ch. 730; Ex parte Hayward, L.R. 6, Ch. 546: Banner v. Johnston, L.R. 5, H.L. 157.*

Garrick, Q.C., for the trustee, referred to sects. 27 and 28 of *The Insolvency Act of 1874*, and rule 58, and objected to the jurisdiction as the time for appealing had expired. He also referred to section 56 as to the power of the trustee to require further evidence of the proof of debt, and he contended that as to the proof of debt of the 2nd July, the affidavit put in by Crosby contained no further information than the previous one of the 12th of October.

Griffith, Q.C., in reply said that the claim was entertained, and finally rejected on the 29th of July, the proof was not filed in court by the trustee till the 29th of July.

Pring, J., was of opinion that he had jurisdiction in the matter, and he ordered that the time for entertaining the appeal be enlarged.

Griffith, Q.C., then moved on appeal for the reversal of the trustee's decision in respect of the proof of the debt according to notice.

Pring, J., reversed the trustee's decision as to the proof of Crosby's debt, and ordered the proof to be admitted.

No costs were allowed for the reversal of the decision, but costs were allowed to the trustee on motion for the enlargement of time, which costs the judge fixed at 8 guineas

Solicitor for claimant, *MacPherson.*

Solicitors for trustee, *Foxton & Cardew.*

HARDING, J. October 14th, 1881.

PERKINS *v.* "THE EVANGELICAL STANDARD."

Taxation of Costs—Refreshers.

When the trial of an action commences on one day and is concluded on the next day, refreshers to counsel will be allowed, no matter whether the trial on the whole occupied more or less than one day's sittings.

THIS was a summons to review the taxation of the costs of the action. In argument, the case of *Brown v. Sewell, L.R. 16 Ch. D., 517*, was relied upon; the rule laid down in which is as follows :—"When the trial of an action commences on one day and is concluded on the next day, refreshers to counsel will not be allowed unless the trial on the whole occupied more than one day's sittings, i.e., six hours." His Honor said that he would follow the rule laid down by His Honor the Chief Justice, viz.:—"When the trial of an action commences on one day and is concluded on the next, refreshers to counsel should be allowed, no matter whether the trial on the whole occupied more or less than one day's sittings."

Solicitors for the plaintiff, *Hart & Flower.*

Solicitor for the defendant, *Mein.*

LILLEY, C.J. October 17th, 1881.

MUNICIPAL COUNCIL OF COOKTOWN *v.* BUDGE.

Sections 209 to 213 of the "Local Government Act of 1878."

THIS was an application under order IX, rule 2, for an order for substituted service of the writ of summons. The writ was endorsed with a claim for £8 12s. 8d. for arrears of rates and interest, and the affidavit on which the application was made shewed, that that amount was due for rates, that the defendant, who lately was residing and carrying on business at Cooktown, had left that town, and it was not known where he was, and that the land on account of which the rates were claimed could not be leased under sects. 209 to 213 of *The Local Government Act of 1878.*

Chambers, in reply to an objection from the learned Chief Justice, that it was not a fit action to bring in the Supreme Court, submitted that it could not be brought either in the Small Debts Court or the District Court, and quoted the *Small Debts Court Act of 1867*, sects. 2 & 20; the *District Courts Act of 1867*, sects. 40 & 41; and Rules, Nos. 38 to 46.

His Honor, without deciding the point whether the lands of the defendant could be sold under an execution issued in an action for rates under the *Local Government Act of 1878*, made the order asked for, but stated that on any future application

for allowance of costs he should require to be conclusively satisfied by affidavit that it was impossible for the plaintiffs to avail themselves of the provisions of ss. 209 to 213 of the *Local Government Act of 1878*.

Solicitor for plaintiffs: *Chambers*, agent for *Barnett*, Cooktown.

LILLEY, C.J. October 19th, 1881.

IN RE W. P. MORGAN, GENTLEMAN, ONE, ETC.

Taxation of costs—31 Vict., No 20, sect. 24 (Costs Act, 1867).

The Registrar has no power to make an order for the taxation of a bill, giving liberty to the client to question the retainer; the order must be made by a judge.

THIS was an application for an order to tax a bill of costs of Mr. W. P. Morgan, solicitor, against one John Romberg, reserving to Romberg leave to dispute the retainer of Mr. Morgan. The bill was delivered on September 20th, and an application had been made to the Registrar under section 24 of the *Costs Act of 1867* for an appointment for taxation, reserving a right to dispute the retainer, but the Registrar refused to give any appointment other than the ordinary one, being of opinion that he had no power to do so.

Chambers appeared for *Romberg*, and cited *Chitty's Practice, 13th ed., p. 127*; *In re Pyne, 6 C.B., 407*; *Nelson v. Stark, 2 M. & Sc., 820*; *In re Thurgood, 19 Beav., 541*.

LILLEY, C.J.:—The Registrar has no power to reserve the right to dispute the retainer. The taking out of the order to tax is a tacit admission of the retainer, and when the right to dispute it is required the order must be made by a judge.

Solicitor for Romberg: *Chambers*, agent for *Marsland*, Charters Towers.

FULL COURT.

December 6th, 1881.

MILES *v.* MCILWRAITH.

MOTION upon notice on behalf of the plaintiff that the appeal to the Privy Council be allowed. At the October sittings of the Full Court leave to appeal was granted upon the following conditions:—Plaintiff to pay the defendant his taxed costs up to this time on the defendant giving security to the satisfaction of the Registrar to abide the order in the suit with respect to costs; also that the plaintiff give security in the sum of £500 to the satisfaction of the Registrar for the due prosecution of the appeal, &c. The plaintiff to be at liberty to pay £500 into court in lieu of the security.

Griffith, Q.C., (Garrick, Q.C., and *Rutledge* with him) for the appellant, moved upon the certificate of the Registrar, which showed that the £500 ordered as security had been paid into court. *The Attorney-General* appeared for the respondent, but did not oppose the motion.

Appeal allowed.

Solicitor for appellant, *Chambers*.

Solicitor for respondent, *Mein*.

CUNNINGHAM *v.* MCFARLANE AND ANOTHER.

Cattle Stealing Prevention Act (17 Vict., No. 3).

To support a conviction for illegally using an animal under *The Cattle Stealing Prevention Act* (17 Vict., No. 3), the user must commence by trespass.

MOTION to make absolute a rule *nisi* for a prohibition granted by His Honor The Chief Justice, at the instance of John Cunningham against H. T. McFarlane (Acting P.M. at Roma) and W. S. Paul, of the firm of Sloane & Co. Cunningham was in charge of a flock of 20,000 sheep belonging to Sloane & Co., and when he arrived in the neighbourhood of Roma he was superseded by one Jones. Jones found him in a public house, and produced a document countermanding Cunningham's authority. Jones asked if there was any horse at the public house belonging to Sloane & Co. A horse was brought round which was identified as belonging to Sloane & Co., and Jones thereupon proceeded to remove the saddle and bridle, the property of Cunningham. Cunningham then interfered, mounted the horse and rode away. Cunningham, on his way to Roma, met Paul, who demanded possession of the horse, but refused to produce his authority, stating that he was Sloane & Co. Cunningham, who had been ap-

pointed by one Kilgour, the New South Wales representative of Sloane & Co., refused to recognise Paul, and rode away towards Roma. Paul followed, and in Roma endeavored to obtain possession of the horse, and eventually gave Cunningham in charge for illegally using, Cunningham, according to his account, having ridden the horse in order to pay the wages of a man who had been employed with the sheep. At the time of his arrest no actual delivery of the sheep to Jones had taken place. Cunningham was fined £2 by the Roma Bench. The rule was granted upon the following grounds, viz.:—(1) That there was no evidence to show that Cunningham had used the horse for his own pleasure, convenience, or profit, and (2) That he made a *bona fide* claim to be in lawful possession of it.

Power moved the rule absolute.

Griffith Q.C. (*Ringrose* with him) showed cause on behalf of Paul, and submitted that at the time the offence was charged the horse was in the possession of Sloane & Co., by their agent, Jones, who had taken possession of it at the public house, —that there was a sufficient determination of the bailment, and the horse being in the physical possession of Sloane & Co.'s agent, Cunningham was guilty of an offence against the statute.

He quoted *The Queen v. Steer (1 Denison's Crown Cases, 349)*, and submitted that there was ample evidence from which the justices might find that the offence had been committed, the only question was whether the bailment had been determined. If it had been he was using the horse for his own pleasure, convenience, or profit, and that a deliberate trespass of this kind was an offence against the statute, and that the rule should be discharged.

HARDING, J.:—This case comes before us on motion to make absolute a rule *nisi* for a prohibition obtained from The Chief Justice against a conviction made by certain magistrates against one Cunningham for the unlawful user of a horse under the *Cattle Stealing Prevention Act*. As I gather from the facts, Cunningham was in possession of this horse and certain sheep and their appliances, lawfully. It was alleged that an agent of the owners had been appointed to retake possession of these sheep and horse from Cunningham; that Cunningham was, undoubtedly, immediately previous to the attempt to take possession, in possession of a certain horse. I think that the evidence shows nothing further than an attempt to regain possession of this horse from the agent, and that if it does that, Cunningham had not admitted the appointment of the agent, which was in dispute, and consequently there was a *bona fide* claim made to the horse by Cunningham, which at the time the possession was alleged to be regained by the agent had not determined. Unless the horse were taken from the possession of a third party the party using it would not be liable under this Act, in other words, as said by The Chief Justice, the user must commence by trespass. The rule must therefore be made absolute, with costs against Paul.

PRING, J.:—I am of the same opinion. I think the possession was never out of Cunningham to such an extent as to warrant the action taken in this matter. The Act was never passed to meet such a case as this. Rule absolute, with costs against Paul.

Solicitor for Cunningham: *Chambers*, agent for *F. H. P. Thompson*, Roma.

Solicitors for Paul: *Little, Browne, & Ruthning*.

SOUTH NEW ZEALAND GOLD MINING CO. AND OTHERS *v.* BULLEN AND OTHERS.

The Companies Act, 1863—Gold Fields Act, 1874, sec. 82.

The complainant in an action testing the legality of the forfeiture of shares in a gold mining company should take his proceedings in the Supreme Court under the *Companies Act of 1863*. The District Court has no jurisdiction given to it by the *Gold Fields Act of 1874*, or otherwise, to entertain such an action.

MOTION on behalf of the above-named company to make absolute a rule *nisi* for a common law prohibition granted by Mr Justice Pring, restraining Robert Bullen, miner, of Gympie, and Isidore John Blake, Judge of the Central District Court, from proceeding upon a certain order made

by the said Judge, on the 28th October, on the ground that the District Court had no jurisdiction to try the matter.

Griffith, Q.C. (Sheridan with him).

The Attorney-General and *Power* shewed cause on behalf of Bullen.

The Attorney-General: This is a suit instituted before Judge Blake in the District Court at Gympie, by Robert Bullen, to recover possession of certain shares in the South New Zealand Gold Mining Company, which shares had been forfeited by the company under their articles of association.

The case first came on for hearing in June, 1881, when *Real*, who appeared for the company, objected to the case proceeding on the ground that the Judge had no jurisdiction. The objection was overruled. *Real* further objected on the ground that all the necessary parties were not before the court. The judge adjourned the hearing till the October sittings, giving leave to Bullen, if so advised, to add the names of the necessary parties. Additional defendants were then joined.

The plaint sets out that the defendants are a limited company, under *The Companies Act of 1863, and The Companies Amendment Act of 1875*, and carry on mining operations at Gympie; that the company was established for the purpose of mining and obtaining gold from an area of land or mining tenement at Gympie; that the plaintiff was a shareholder in the company; that a call was made, and that the plaintiff's shares were forfeited for non-payment.

The plaintiff prayed—

(1) That the action of the directors in declaring the forfeiture of the plaintiff's shares may be declared illegal. (2) That the advertising of same for sale and the sale thereof (if any) may be declared illegal. (3) That the defendants be ordered to restore to the plaintiff his said 1800 scrip or shares therein, and replace his name as a shareholder to that extent in the books of the said company. (4) That any damage the plaintiff may have sustained by reason of the wrongful acts of the defendants may be adjudged to be paid by him. (5) That the defendants may be ordered to pay the costs of this suit

Judgment was found in favor of Bullen.

The Attorney-General admitted that unless the District Court had the powers of a Court of Equity it could not give the relief sought for in this case, but contended that the 82nd section of *The Gold Fields Act of 1874*, viz.:—

"In addition to the present jurisdiction of District Courts under the *District Courts Act of 1867*, every District Court, holding its sittings on any gold-field, shall have original jurisdiction to hear and determine all questions which are within the jurisdiction of the Wardens' Court, and shall have the like jurisdiction to hear and determine questions involving title to land which may arise as aforesaid under this Act, and shall also have an equitable jurisdiction to the extent possessed by the primary Judge in Equity in respect of all questions, matters and things arising under this Act as aforesaid, which may require to be determined by a Court of Equity."

gave the District Court the same jurisdiction as the Warden's Court in matters relating to mining, and by section 31, the Warden's jurisdiction is "to hear and determine all actions, suits, claims, demands, disputes, and questions which may arise in relation to mining." By section 32 the several Warden's Courts are given jurisdiction in matters involving "the trial of a right to any claim, residence, business or machinery area, or other mining tenement or share therein." That section contemplates the Warden dealing with the right to shares in claims. By the interpretation clause "a claim" is defined to be "the portion of Crown land which any person or number of persons shall lawfully have taken possession of and be enabled to occupy for mining purposes." Section 62 contemplates the right to any share or claim being determined by the Warden. Section 69 provides that "no person shall be entitled to institute proceedings in any court whatsoever to recover possession of any claim or of any share therein, &c., unless he shall have been the holder of a miner's right at the time his alleged title to recover first arose or accrued," the converse being that persons having a miner's right can have their claims litigated in the Warden's court.

The Chief Justice: The qustion is this—Does the jurisdiction of the Warden extend to anything more than the physical dealing with the land?

The Attorney-General: He has to deal with all questions relating to mining.

The Chief Justice: Could you argue that

shares in a company are shares in a claim—that they represent land?

The Attorney-General: The whole property of the company is the claim itself.

The Chief Justice: Could it be contemplated that the Warden should exercise all the authorities of a Court of Equity? What machinery has he?

Pring, J.: The question is whether shares in a joint-stock company fall within the matters arising under *The Gold Fields Act?*

The Attorney-General: If these parties had been partners, there is no doubt that he could have sued for his share in the mine; therefore the share in the company is equivalent to the share in the mine. If he recovers these 1800 shares he will recover a right to work the mine to the amount of his voting power; therefore, I submit that this is a question relating to mining.

Harding, J., referred to *Lindley on Partnership pp. 667, 674, 675.*

The Chief Justice: Does a mining corporation take out a miner's right for each individual shareholder?

Griffith, Q.C.: There is a provision for a consolidated miner's right to be taken out by a company.

Harding, J.: If the District Court has this right, why is there the provision in the clause relating to the winding-up of companies to send matters to the District Court?

The Attorney-General: The 9th section of the Act of 1875 gives power to the Supreme Court to direct certain proceedings to be had in the District Court. The Act does not take away the jurisdiction of the Supreme Court but it supplies an additional jurisdiction. No Act has taken away the power of the Supreme Court to investigate any matter, the fact that the Act of 1875 gives jurisdiction to the Warden's Court does not take away the jurisdiction of the Supreme Court, it simply gives to the Warden an additional power, a power to deal with all matters connected with mining.

Harding, J.: Supposing a man holding an interest in a mine were to die and devise his interest to five or six, would the District Court construe his will, or if it was settled under a marriage settlement would the District Court decide whether it was settled to the wife's separate use or not?

The Attorney-General: Certainly not.

Harding, J.: If there is jurisdiction in all equitable questions relating to a mine there would be no limit whether the questions arose under a will or a marriage settlement.

The Attorney-General: If the dispute related to mining I submit the District Court judge, having all the powers of the primary judge in equity, would have jurisdiction.

The Chief Justice: He has a very large jurisdiction because, by section 82, in addition to the present jurisdiction under *The District Courts Act* he has also an equitable jurisdiction to the extent possessed by the primary judge in equity. Now that may involve questions arising under settlements, deeds, wills, &c.

The Attorney-General: That is put in because in *The District Courts Act* he has no jurisdiction where the title to land is involved. He has three things given him here, the Warden's jurisdiction, jurisdiction where the title to land is involved, and the primary judge's jurisdiction.

The Chief Justice: This is a possible reading of section 82, reading section 31 with it. "It shall be lawful for the Governor by proclamation in the Gazette to establish on any gold-field one or more courts to be presided over by a Warden or Wardens and assessors, and which shall be a court of record and shall have jurisdiction to hear and determine all actions, suits, claims, demands, disputes, and questions which may arise in relation to mining"—then we come to the 82nd section "In addition to the present jurisdiction of District Courts under '*The District Courts Act of 1867*' every District Court holding its sittings on any gold-field shall have original jurisdiction to hear and determine all questions which may arise as aforesaid, that is in relation to mining, and shall also have an equitable jurisdiction to the

extent possessed by the primary judge in equity in respect of all questions arising as aforesaid, that is relating to mining. Then is it anything more than this, the equitable jurisdiction given by the last part of section 82 is merely ancillary to the jurisdiction given to the Warden's Court, it is merely the jurisdiction of the Warden's Court with equitable powers.

The Attorney-General: That is my contention.

The Chief Justice: Do you think the Warden could entertain this point, grant the relief ask for here?

The Attorney-General: Yes, I submit the Warden could under section 32.

The Chief Justice: Could this have originated in the Warden's Court? We are all inclined to think that the District Court has no larger jurisdiction than the Warden's Court, it may have larger powers to make its jurisdiction available.

The Attorney-General: If we take the case of co-partners he would have a right to proceed in the Warden's Court, then does the accident of the company being incorporated deprive him of his right. It is a dispute relating to exactly the same thing, his right to deal with a certain gold mining area; if he has any right to deal with a gold mining area then I submit his claim is a claim relating to mining, and the fact of a number of shareholders incorporating themselves cannot take away his right. He claims to be one of that corporation and to be possessed of the land.

The Chief Justice: This Act deals with mining. *The Companies Act* deals with the members of a company and their rights as members. The corporation is merely an artificial body, its existence, its health, and its domestic economy is regulated by *The Companies Act*, and the Supreme Court alone has equitable powers in relation to the company. In relation to the physical possession of the mine *The Gold Fields Act of 1874* has given equitable jurisdiction to the District Court so far as it is needful to the exercise of its jurisdiction, which is not more extensive than the Warden's except in its equitable powers.

The Attorney-General: There is no doubt the two Acts are entirely different, one relates to mining and the other to the way in which a company shall do its work.

The Chief Justice: Under the Gold Mining Act the shareholders are represented by the company, are merged in the company, the company is the miner.

The Attorney-General: I submit the whole property of this gold mining company of which it is deemed to be in possession by the law is a mine, and that the powers inserted in the 82nd section relating to the District Court were so inserted that the Warden's and District Courts might have power to try questions of this sort and so prevent the expense and delay which would be occasioned by bringing witnesses from distant parts down to Brisbane. That this is a matter relating to mining and consequently within the jurisdiction of the District Court, and that this rule should be discharged.

Power referred to section 32, which he submitted to some extent explained the meaning of the word "mine" in section 31.

Griffith, Q.C., was not called upon.

LILLEY, C.J.:—They are two distinct branches of the law—*The Companies Act* and *The Gold Fields Act*, and the question in this case was one which ought to have been dealt with by the proper tribunal which has jurisdiction for settling the rights of members of companies amongst themselves, for adjudicating upon the constitution and existence of companies, and that statute is *The Companies Act of 1863*, and it was under that statute the complainant in this case should have taken his proceedings. It seems to me *The Gold Fields Act* merely gives to the District Court judge the limited jurisdiction the Warden has under the statute; it gives to the judge certain equitable powers to make the jurisdiction given to him under the statute effective. The plaintiff misconceived his remedy and I think the rule must be made absolute with costs against the plaintiff below.

HARDING and PRING, JJ., concurred.

Solicitors for appellants, *Wilson and Wilson*, agents for *Tozer*, Gympie.

Solicitor for respondent, *Chambers*, agent for *F. L. Power*, Gympie.

CROWN CASE RESERVED.

REGINA *v.* GASH.

Offences against the person Act, section 49.

Where an information contains in the very language of the statute a charge of misdemeanor, except in respect to the introduction of the word *feloniously*, and there is no language that would contain a substantive crime in the nature of felony, the word *feloniously* will be rejected as surplusage.

THIS was a special case stated by Mr. Justice Harding.

The prisoner was tried at the Brisbane Criminal Sittings, on the 2nd December last, upon an information charging him that he, on the 23rd of August, 1881, at the South Pine River, in and upon one Martha Chesterfield, a girl under the age of twelve years, to wit, of the age of eleven years and eight months, feloniously did make an assault, and her, the said Martha Chesterfield, then feloniously did unlawfully and carnally know and abuse. The Attorney-General opened the case as an offence defined in section 49 of the *Offences against the Person Act*, and the case was so treated throughout the trial by the judge and counsel upon both sides, Mr. Swanwick appearing for the prisoner. Martha Chesterfield was examined and cross-examined. In her examination in chief she stated that she was twelve last Monday, and gave the name of her parents, brothers, and sisters, and other particulars. A duly certified copy of an entry in a Register of Births, kept in the General Registry Office, Brisbane, was tendered by the Attorney-General and received in evidence without objection. The entry was of a birth on the 28th November, 1869, at German Station Road, of a female child named Martha, whose parents' names were Thomas and Mary Anne Chesterfield. It also contained the names and ages of their other children, agreeing in such particulars with the statement of Martha Chesterfield. Mary Anne Chesterfield (the mother) was examined, and referred to Martha as one of her children. On one or two occasions German Station was mentioned as a former residence of the family. In charging the jury His Honor told them that the above was all the evidence as to Martha's age before them, and that if they were satisfied of her identity with the person named Martha in the certificate of birth from a consideration of the facts above stated, her age was fixed thereby, but they must be satisfied that her age was between ten and twelve years, or find the prisoner not guilty. After the jury retired, Mr. Swanwick called His Honor's attention to the fact that he had not told the jury that there was no evidence of the identity of the person in the certificate with Martha, and asked His Honor to reserve the point for the consideration of the Full Court. The jury found the prisoner guilty. Mr. Swanwick moved the arrest of judgment on the following grounds:—(1) That the information charged the prisoner with a felony, and the crime of which he had been found guilty under the 49th section was a misdemeanor by statute. (2) The prisoner being charged with a felony by the Crown, the jury had left the court, not in charge of any officer of the court, after the information was exhibited and before the verdict. These points were not raised or urged to the jury at all, or to the court, until the times mentioned. His Honor postponed judgment until the questions should have been considered by the Full Court.

The Attorney-General appeared in support of the conviction.

There was no appearance on behalf of the prisoner.

With regard to the first point the court held that, inasmuch as nothing was said to the jury, and no objection raised by the prisoner's counsel during the trial, he must be taken to have accepted the evidence regarding the girl's age as sufficient. It could not allow counsel to lie by, they must deal fairly and candidly with the court. But independently of that there was evidence to go to the jury as to the girl's age.

As to the second point, *The Attorney-General* submitted that the word *feloniously*, in the information, was mere surplusage.

The Chief Justice referred to the case of the *Queen* v. *Wilkie*, the converse of this, in which the judge (Lutwyche, J.) at the trial, upon his own motion, struck out the word *feloniously* in the information as unnecessary. The man was convicted of felony, the information containing a concise description of the offence, but the word *feloniously* was omitted because the judge struck it out. The case came before the Full Court (Cockle, C.J., and Lutwyche, J.), and it was held that the word *feloniously* was a word of art, and should have been put in, and the prisoner was discharged.

The Attorney-General quoted *Scofield's case, (2 East's Pleas of the Crown, 1029)*, in which case it was held that the insertion of the word *feloniously* did not constitute a felony, and if the offence charged amounted to a misdemeanor and not a felony, the prisoner would be properly convicted and the word *feloniously* rejected as surplusage, and submitted that the defect was cured by the verdict, because the jury must have found the act to have been unlawful—that everything necessary to found a charge of misdemeanor had been done.

The Court reserved judgment merely on the question of the word *feloniously* having been used.

LILLEY, C.J.:—I have had the opportunity of considering the point made by the counsel for the prisoner. The facts appear to be clearly these. Until the close of the trial no one averted to the fact that the word *feloniously* had been introduced into the information at all. The man suffered no disadvantage whatever, but was tried without a word of comment or objection for the substantive misdemeanor under the statute. The section of the statute was used, and the information contains in the very language of the statute a charge of misdemeanor, except in respect of the introduction of the word *feloniously*. I think that the word may be rejected as surplusage. There is no case against it, and it seems to me to be a construction of common sense. The language of the information contains the substantive misdemeanor, and there is no language that would contain a substantive crime in the nature of felony in the information. The conviction must be affirmed.

PRING, J.:—I concur. I consider a substantive offence against the 49th section of the *Offences against the Persons Act* is shown in the information, and although it may contain the words "feloniously did make an assault and her the said Martha Chesterfield"—and also the word "feloniously" in the next line—still, these words being left out, a substantive offence appears in the information sufficient to charge an offence against the 49th section. The conviction must therefore be affirmed.

Conviction affirmed accordingly.

IN CHAMBERS.

PRING, J. 7th December, 1881.

HANCOCK AND OTHERS v. BERRY.

A writ of *elegit* directing a sum to be levied, different in amount from that mentioned in the judgment, although smaller, is irregular, unless the reason of the variance be shown on the face of the writ. The Court will not amend the writ where the defendant has become insolvent after the issuing of the writ, even though there is an affidavit of debt showing the variance, and filed prior to the issue of the writ.

THE facts are sufficiently set out in the judgment.

PRING, J.:—This was an application (on summons) on behalf of John Welsby, (trustee of the insolvent estate of the defendant,) that the writ of *elegit* issued in the above action, dated the 18th of October, 1881, and the inquisition and all subsequent proceedings under the writ, be set aside for irregularity on account of the variance between the amount for which the judgment in the above action has been signed and the amount for which the writ of *elegit* has been issued, and that the above-named plaintiff pay the costs of this application. Mr. Griffith, Q.C., appeared for the trustee (Welsby); Mr. Garrick, Q.C., appeared for the plaintiffs. Affidavit of T. O'Sullivan and

John Welsby were read in support of the application. An affidavit of the debt made by Josias Hancock, one of the plaintiffs, was read, and also an affidavit of P. L. Cardew. Mr. Griffith, Q.C., in support of the application, cited *Webber v. Hutchins, 8 M. & W., p. 319*, and *Sherwood v. Clark, 15 M. & W., p. 765*. Mr. Garrick, Q.C., contended that the affidavit of debt by Josias Hancock, filed prior to the issue of the writ of *elegit*, was, according to the practice of the court under the Judicature Act sufficient, and that therefore the irregularity here complained of could not be taken advantage of. He also contended that the irregularity (if any) had been waived. Also that the trustee was not in time to urge his objection, and that steps should have been taken immediately after his appointment to set aside the writ. Mr. Griffith, in reply, contended that the practice has never altered, and that the affidavit of debt only furnished material by which to amend the writ, which could not in this case be amended by reason of the defendant's insolvency. He cited on this last point *Hunt v. Pasnam, 4 M. & S., p. 329*. The irregularity here complained of is that the amount directed to be levied under the writ does not correspond with the amount mentioned in the judgment. The writ of *elegit* does not show on the face of it how the residue of the judgment has been disposed of. It appears that the sum stated in the writ of *elegit* directed to be levied was £87, together with £10 14s. 6d. costs, and the sum mentioned in the judgment was £166 2s. 1d. I think the cases cited by Mr. Griffith decide that the variance between the amounts stated in the writ and the judgment is an irregularity, in consequence of which the writ, &c., must be set aside; and however hard it may be on the plaintiffs that should lose the fruits of their diligence and their judgment by a technical objection, nevertheless I feel bound by these authorities. In *Webber v. Hutchins*, Parke, Baron, in delivering the judgment of the court, says:—"The writ must agree in the mandatory part of it with the judgment. If the plaintiff sues out execution for a part only of the sum recovered by the judgment he may direct the sheriff accordingly by a private memorandum; but if the judgment and the writ do not agree the reason of the variance ought to appear on the face of the writ." I do not think the affidavit of debt shows a reason for the variance. The variance should have been shown on the face of the writ. It does not appear to me that the irregularity was ever waived, or that there was unreasonable delay on the part of the trustee in making this application. In consequence of the insolvency of the defendant I am unable to make any amendment. *(Hunt v. Pasnam, 4 M. & S., p. 329.)* The writ of *elegit*, &c., will therefore be set aside in terms of the summons. Costs allowed.

Writ of *elegit* set aside accordingly.

Solicitor for trustee: *Thynne*, agent for *O'Sullivan*, Ipswich.

Solicitors for plaintiffs: *Foxton and Cardew*, Brisbane and Ipswich.

HARDING, J. November 7th.

IN RE MINNIS.

Goal Regulations—Right of Legal Adviser to interview prisoner out of hearing of gaol officials.

Swanwick (legal practitioner) applied to Mr. Justice Harding for a rule calling upon the Sheriff of Queensland to show cause why he (Mr. Justice Harding) should not order the keeper of Her Majesty's Gaol to permit *Swanwick* to interview Michael Minnis (then in gaol on a charge of murder) at all reasonable hours up to the day of his trial without the presence of the said gaoler or other officials. Mr. Justice Harding made the rule absolute, granting leave to *Swanwick* to interview the prisoner at all reasonable hours, the gaoler and his officials to be at liberty to see the parties during such interview but not to hear them, the gaoler however to have all the powers given to him under the Gaol Regulations.

IN CHAMBERS.

PRING, J. January 26th, 1882.

CROSBY *v.* LANDY.

Where the case has been sent down from the Supreme Court to be tried in the District Court, the District Court Judge has no power to make an order as to costs, but the Registrar of the Supreme Court may in such case tax the costs on the District Court scale *(See Farmer v. May, 50 L.J., C.L., 295.)*

THIS was an application that judgment be entered for the defendant with costs, and that the certificate of the Registrar of the District Court holden at Dalby, dated the 19th day of December, 1881, be varied, so far as it directs that such costs be under the District Court scale, from the date of the order of Mr. Justice Pring transferring the case from the Supreme Court to the District Court.

Power appeared for the defendant to support the application.

Bernays for the plaintiff, opposed the application, and submitted that there would have been no necessity to come to the Court to sign judgment if the District Court Judge had been silent as to costs, and he cited section 79 of *The District Courts Act of 1867*, and *Wheatcroft v. Foster, 27 L.J., Q.B., 277.*

PRING, J.:—I think that it was no part of the District Court Judge's duty to decide the scale upon which the defendant's costs should be taxed. I think that under section 107 of *The District Courts Act of 1867* he had only to pronounce judgment, but I also think that according to *Wheatcroft v. Foster*, the Registrar of the Supreme Court would have the power to tax on the District Court scale, and would be upheld by the Court in such mode of taxation. I vary the certificate of the Registrar of the District Court by ordering the defendant's costs to be taxed by the Registrar of the Supreme Court on the District Court scale, and by consent, I fix counsels and attorneys fees at 30 guineas inclusive, each party to pay his own costs of this application.

Solicitors for the plaintiff, *Roberts, Roberts, & Bernays.*

Solicitor for the defendant, *Bunton.*

PRING, J. February 1st, 1882.

MILLS *v.* DAY DAWN BLOCK GOLD MINING COMPANY LIMITED.

THE facts of the case appears sufficiently in the judgment.

PRING, J.:—On the 21st of December, 1881, Mr. Griffith, Q.C., on behalf of the plaintiff in this action, moved for an order *nisi* calling on the defendants to show cause "why they should not be restrained from employing one Mr. Luke Wagstaff Marsland as their solicitor in the above action, and why Mr. Marsland should not be restrained from acting as such solicitor, or from communicating to the defendants or their counsel or solicitors any information relating to the matters in question in this action that came to his knowledge as town agent to the plaintiff's solicitor." The several affidavits of Thomas Mills and W. P. Morgan were filed in support of the motion. Mr. Griffith, Q.C., cited the cases of *Earl Cholmondeley v. Lord Clinton, 19 Ves., p. 261*, and *Davies v. Clough, 8 Simon, p. 262.* I granted an order *nisi* in the above terms, and made it returnable on the 28th December, on which day Mr. Chambers, on behalf of the defendants, obtained an adjournment until the 25th of January, 1882. On the application of Mr. Griffith, Q.C., I granted an interim injunction, extending to the 26th of January, to restrain Mr. Marsland in terms of the above order. The hearing of the case, after a further adjournment of two days, came on before me on the 27th instant. Mr. Attorney-General (Mr. Pope Cooper) appeared in support of the rule, and Mr. V. Power appeared to show cause, and read an affidavit of Luke Wagstaff Marsland. Mr. Attorney-General, in moving the order absolute, in addition to the cases cited by Mr. Griffith, Q.C., cited the cases of *Johnson v. Mariatt, 2 Dowling, p. 243; Grissell v. Peto, 9 Bingh, p. 1; Brichenow v. Thorp, 4 Jacob, p. 300; Beer v. Ward, 1 Jacob, p. 77*, and *Joyce on Injunctions, vol. 1, p. 693.* Mr. V. Power cited the cases of *In re Holmes, Electric Power, Company, In re Fisher's Digest, 1870—1880, vol. 2 column 3,200; Grissell v. Peto, Johnson v. Mariatt,*

and *Robinson v. Mullett, 4 Price, p. 353*, and he also referred to *Cholmondeley v. Lord Clinton*, at *p. 265*. I reserved my judgment. So far as regards the question of the jurisdiction of the Court to deal with applications of this kind, I may refer to that part of the judgment of Vice-Chancellor Shadwell, in *Davies v. Clough, at p. 267*, which is as follows:—"The cases, however, appear to afford this general principle, namely, that all courts may exercise an authority over their own officers as to the propriety of their behaviour; for applications have been repeatedly made to restrain solicitors who had acted on one side, from acting on the other, and those applications have failed or succeeded upon their own particular grounds, but never because the court had no jurisdiction. The question therefore is, whether the circumstances of this case furnish a ground for interference." The judgment in *Davies v. Clough* was affirmed by the Lord Chancellor (Cottenham) in February, 1837. In deciding, therefore, whether this order should be made absolute or not, I must find from the facts disclosed in the affidavits whether or not there are grounds for the interference of the Court. The affidavits of Mr. Mills and Mr. W. P. Morgan show that in February, 1881, the firm of Messrs. Edwards and Marsland, of Brisbane, were the town agents of Mr. W. P. Morgan, of Charters Towers, the attorney of the plaintiff, and that Mr. Marsland was the member of the firm who particularly attended to the agency business of Mr. Morgan, as attorney for the plaintiff, in certain actions in connection with which the above case of Mills *v.* The Day Dawn Block Gold Mining Co. arose. Mr. Marsland ceased to be a member of the firm on the 20th May, 1881, and subsequently followed his profession at Charters Towers, where he was employed by the defendants as their attorney in the above action. It is averred, both by Mills and Morgan, that Mr. Marsland, as such agent, became possessed of information which he could not otherwise have obtained, and which would be greatly prejudicial to the plaintiff's interest if Mr. Marsland was allowed to act as the attorney for the defendants. The allegations of Mills and Morgan appear to me to be rather too general, and the particular information gained by Mr. Marsland, as such agent, and alleged to be prejudicial to the interests of the plaintiff, if disclosed by Mr. Marsland to the defendants, is not stated. Still, however, I think these affidavits were quite sufficient to justify me in granting the order. The affidavit of Mr. Marsland, however, is very full, and distinctly sets forth all the business which he, as such agent, transacted; he also most distinctly and positively affirms that he is possessed of no information whatever which he received confidentially, as such agent, in connection with the plaintiff's business, and he further states that all the information he ever derived in the transacting of the plaintiff's business, as agent of Morgan, he derived from the public records of the colony, and which could be obtained by any person interested. I am so far satisfied with this affidavit that I think it is a sufficiently complete answer to the allegations set forth in the affidavits of Mills and Morgan, and, therefore, I decide that I find no sufficient grounds proved to my satisfaction for the interference of the Court. At the conclusion of the argument on the hearing, Mr. Attorney-General applied to me for leave to file affidavits in reply, if I was of opinion that Mr. Marsland's affidavit was a complete answer to the affidavits in support of the motion. No objection being offered by Mr. V. Power, and as I considered, under the circumstances, that the application was reasonable, I assented to it. I shall, therefore, postpone giving final judgment in this matter until Monday, the 27th February, in order to afford Mr. Attorney-General an opportunity of filing affidavits in reply, if deemed advisable. On the application of the Attorney-General I extend the interim injunction until February 27.

On February 27th, the case, by consent, was adjourned until March 3rd.

Solicitor for Mills: *Thynne*, agent for *Morgan*, Charters Towers.

Solicitor for Day Dawn Mining Co.: *Chambers*, agents for *Marsland*, Charters Towers.

IN INSOLVENCY.

The Chief Justice. February 10th, 1882.

IN THE INSOLVENT ESTATE OF LOUIS SEVERIN.

(Insolvency Act of 1874, sect. 167, subsect. 2.)

The Supreme Court in Insolvency has an equitable jurisdiction by virtue of which it exercises control over Trustees under *The Insolvency Act of 1874*; and it will require a report of the Trustee to be filled in all cases before a certificate of discharge will be granted; and in cases where the Trustee resides near the Court, he will be required to attend.

Chambers, on behalf of insolvent, applied that a certificate of discharge might be granted to the insolvent under section 167 (2) of *The Insolvency Act of 1874*. The application came on for hearing on the 8th February, but the creditors' trustee having failed to send in his report, the matter was adjourned, and the trustee and the Accountant in Insolvency were ordered to attend.

The trustee (Mr. Parker) stated his reason for not reporting to the Court arose from a misapprehension, as he was of opinion that the report was only necessary when an application was made to close the insolvency.

The Accountant in Insolvency informed the Court that the trustee had complied with all the requisites of the Act.

His Honor said the Court had always required the report to be filed. The Court had a general equitable jurisdiction, by virtue of which it exercised control over trustees. It was a very wholesome rule which the Court did not intend to depart from. The statute was essentially framed upon equitable principles, and being a statute in which majorities controlled minorities and affected their interests in a very important matter, it was necessary to have control over trustees. Courts of Equity viewed with jealous scrutiny the conduct of trustees and receivers. He should preserve the rule laid down, and require a report in all cases, and when the trustee resided near the Court his attendance would be required.

His Honor gave leave for the report to be filed and granted the certificate.

Solicitor for the insolvent: *Chambers.*

IN THE INSOLVENT ESTATE OF FRANCIS CORRY.

(Insolvency Act of 1874, section 163.)

Fitzgerald applied for an order to annul the insolvency under section 163, the insolvent having arranged with his creditors and obtained release from them. The insolvent had previously applied for a certificate of discharge under section 197 (1), which had been refused, the judge not being satisfied that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible, the principal debt being damages awarded against the insolvent as co-respondent in a divorce suit. The insolvent then arranged with his creditors and obtained their release.

His Honor said if a case should arise in which he thought a man had been culpable, as in the nature of a theft or fraudulent insolvency, and he applied for a certificate which was refused, and he afterwards obtained the release of his creditors, he should not be inclined to annul the insolvency, but in this case the principal debt was damage for a personal injury, and the party injured was satisfied, therefore he would treat this as an exceptional case and order the adjudication to be annulled.

Solicitors for insolvent: *Murphy & Patterson.*

Harding, J. February 20th, 1882.

IN RE BROMBERG, EX PARTE NEWMAN.

Undischarged insolvent—Property acquired—Earnings of personal labor—Insolvency Act of 1874 (38 Vic. No. 5 sec. 87).

Simon Bromberg, a commercial traveller, was adjudicated an insolvent in March, 1881, and G. H. Newman was appointed Official Trustee in his estate. In May, 1881, Bromberg entered the service of S. Davis & Co., of Brisbane, as commercial traveller. His remuneration was fixed at £3 a week salary, with a commission of 1 per cent. upon all sales effected by him for his employers and of 1½ per cent. upon sales effected by him for other houses through Davis & Co. In addition Davis & Co. agreed to pay all his travelling (including hotel) expenses while on his journeys. Under this employment Bromberg made several journeys, and sold a considerable

amount of goods. At the termination of his engagement he had been paid all the salary and most of the expenses, and there remained due to him the commission upon the sales and some small amount for travelling expenses. The sum claimed by him being disputed by Davis & Co., the insolvent brought an action against them in his own name in the Small Debts Court, Brisbane, and on 7th of February last, by consent, a verdict for £22 10s. was entered for Bromberg. He had employed a solicitor—A. J. Thynne—and was indebted to him for the costs of recovering the above amount. Davis & Co. handed the amount of the verdict to their solicitors, Smith & Smith, for the purpose of satisfying the verdict. The official trustee obtained from his Honor an order restraining Bromberg from receiving the money and from proceeding further in the action, and calling upon Bromberg to shew cause why this money should not be received by the trustee for the benefit of Bromberg's creditors. The insolvent made an affidavit in which he stated that the remuneration received from Davis & Co. was not more than sufficient to enable him to maintain himself; and that he owned money for board and lodging and clothes to several creditors which he could not pay, and that he was indebted to his solicitor, Thynne, for the costs of the action against Davis & Co.

Chubb, for the insolvent, and for Thynne who claimed a lien on the fund for his costs, showed cause.

The money is wages, the proceeds of the insolvent's personal labor, and does not pass to the trustee. *Chippendale v. Tomlinson, 1 Cooke's Bankrupt Laws 428.* In that case Lord Mansfield is reported p. 431, as saying—"The assignees cannot let out the bankrupt; they cannot contract for his labor." *Hesse v. Stevenson, 3 B. & P., 565-578; Williams v. Chambers 10 Q.B. 337; Kitson v. Hardwick, L.R., 7 C.P. 473, per Willes, J., 479; Smith's Mercantile Law, 8th Ed., 646-647.* The cases are all collected in Tate, Sec. Bankruptcy.

[His Honor referred to *Emden v. Carte, L.R. 17 Ch. D. 169*, affirmed on appeal *768.*]

That case is distinguishable from the present. There the insolvent was carrying on a business with a large staff of clerks. But, if not, and admitting the principle of that case, "there is no margin of profit" here to go to the trustee. As to Thynne, it is settled that a solicitor has a lien for costs upon a fund or property recovered by his exertions. The trustee has not interfered till after verdict, and if he had not now done so, Bromberg would get the money and as between him and Thynne there is no question but that the lien exists. The same principle must be applied to the trustee, who simply steps into Bromberg's shoes. The trustee ought not to have the benefit of the solicitor's exertions without the burden of them. If the trustee had sued instead of Bromberg he would have incurred costs in the same way. The solicitor is entitled to costs as between attorney and client.

C. E. Smith, for the trustee: The money earned by insolvent was more than sufficient to support him. The commission is not wages. There was enough without the commission to maintain him. The commission is profit and the trustee is entitled to it. As to the lien Thynne knew Bromberg to be an uncertificated insolvent and chose to give him credit. He ought not therefore to have any lien. If entitled to any costs they should only be the costs as allowed by the *Small Debts Court Act.*

His Honor decided: (1) That the insolvent had earned more than sufficient to maintain him, and that the trustee was entitled to the surplus as profit. (2) That Thynne was entitled to his costs of the action, *Bromberg v. Davis*, as between attorney and client, which by consent he fixed at £6 6s., and made the order absolute upon payment of these costs to Thynne. Costs of trustee allowed. No costs to Bromberg. £3 3s. costs to Thynne.

Solicitors for trustee: *Smith & Smith.*

Solicitor for insolvent: *Thynne.*

THE CHIEF JUSTICE. 22nd February, 1882.

EX PARTE J. P. GRIFFIN AND CO.

The Trade Marks Act, 1864, 28 Vict., No. 5.

THIS was a summons, calling upon the Registrar of Trade Marks to show cause why two separate labels should not be registered as one trade mark under *The Trade Marks Act, 1864, 28 Vict., No. 5, s. 4.* Each label had the figure of a griffin upon it and the words "Trade Mark," the rest of the lettering being different.

Miskin, in support of the summons, submitted that nothing in the Act was prohibitory of any number of separate labels being registered as one trade mark, the applicants declaring in their application that the two labels to be used in combination constituted their trade mark, and that it was to be used in respect of one article which was defined in the application.

The Deputy-Registrar, in showing cause, contended that the words of the Act implied a single label or mark only, and that each separate label should be registered as a separate trade mark, there being no provision in the Statute for registering a combination of labels as one trade mark, and that the registration fees should be paid on each label as a separate trade mark.

His Honor referred to the case of *In re Burrow's Trade Marks, 5 Ch. D. 353*, and ruled that the two labels could be registered as one trade mark, and made an order accordingly.

Solicitor for J. P. Griffin & Co., *Macpherson.*

PRING, J. March 3rd, 1882.

MILLS *v.* DAY DAWN BLOCK GOLD MINING COMPANY LIMITED.

THE adjourned hearing of this case *(ante 57)* which was granted on the application of *The Attorney-General*, on the 10th February, to enable the plaintiff to file affidavits in reply to the affidavit of Luke Wagstaff Marsland, came on for hearing before Mr. Justice Pring, on this day.

The Attorney-General and *Griffith Q.C.*, appeared for the plaintiff, *Power*, for the defendant.

An affidavit of W. P. Morgan, sworn on the 17th February, was read by *Griffith Q.C.*, who submitted—that a solicitor having been consulted by a client with the object of bringing an action, and who was also in full possession of the client's case, cannot if he discharges himself of that relation, afterwards act for the defendant in that action, and that if there are points of law involved in the case to which the solicitor's attention has been called, they are as important as matters of fact.

Power contended that the affidavit was not an affidavit in reply, and did not contradict the facts set forth in Mr. Marsland's affidavit.

His Honor discharged the rule on the ground that in his opinion the affidavit in reply did not afford him that information which on the original hearing of the case he required, viz., the particular information in the possession of Mr. Marsland which might be detrimental to the plaintiff's interest in the action of trespass, if Mr. Marsland should be allowed to act for the defendants.

The rule was accordingly discharged with costs.

March 10th, 1882.

MILLS *v.* DAY DAWN BLOCK GOLD MINING COMPANY LIMITED.

Griffith, Q.C., on behalf of the plaintiff, applied upon summons for an order to extend the time for appealing against the judgment of His Honor, Mr. Justice Pring, delivered on the 3rd March, until the next sitting of the Full Court on the 4th April, on the ground that the plaintiff had not time between the delivery of the judgment on the 3rd, and the sitting of the Full Court on the 7th to instruct his solicitor, and therefore could not comply with Order LIII, r. 3 of the Judicature Act, which requires that "every appeal to the court from any decision at Chambers shall be by motion, and shall be made within four days after the decision appealed against if the court be then sitting, or within the first four days after the commencement of the next sitting of the court."

His Honor stated he was of opinion that this

rule was inapplicable since the Term Sitting in Banco had been abolished.

Griffith, Q.C.: The rule was made when the original Banco Sittings of the Court were held.

Power appeared for the defendant.

Pring, J.: I delivered my judgment on the 8rd March, the sitting of the Full Court was upon the 7th, consequently the plaintiff had not four days to appeal after my decision as the court was not sitting, and I am of opinion that the plaintiff has until four days after the commencement of the next sitting of the Full Court, and that he has plenty of time without making this application.

Griffith, Q.C.: It was in order to save any question of the interpretation of the rule that the summons was taken out.

Pring, J.: Could you not have moved on the last sitting day of the March Full Court to enlarge the rule?

Griffith Q.C.: The reason that was not done was, that the plaintiff had not sufficient time to give the necessary instructions.

Pring, J.: Being willing myself to have the case argued before the Full Court, I will grant the application, believing I have the power to do so under Order LVI, r. 6, which enables me to enlarge or abridge the time for doing any act, or taking any proceeding. I therefore abridge the time and grant the application, the costs to abide the result of the appeal.

Solicitor for plaintiff, *Thynne*, agent for *Morgan*, Charters Towers.

Solicitor for defendants, *Chambers*, agent for *Marsland*, Charters Towers.

FULL COURT.

April 4th, 1882.

MILLS *v.* DAY DAWN BLOCK GOLD MINING COMPANY LIMITED.—*In re* MARSLAND.

If there is any evidence that confidential communications have been made by a client to his Solicitor, the Court will restrain such Solicitor from giving up his client and acting for the other party, and the other party, from employing such Solicitor, in any suit between them relative to the same circumstances. The Court will not weigh conflicting testimony as to confidence, when the client swears he had made confidential communications.

This was an appeal from the decision of Mr. Justice Pring discharging an order *nisi* calling on the defendants to show cause "why they should not be restrained from employing one Mr. Luke Wagstaff Marsland, as their solicitor in the above action, and why Mr. Marsland should not be restrained from acting as such solicitor, or from communicating to the defendants or their counsel or solicitors, any information relating to the matters in question in this action that came to his knowledge as town agent to the plaintiff's solicitor.

The facts are sufficiently stated in the judgment below; and *ante*, p. 57.

The *Attorney-General*, *Griffith, Q.C.*, and *Lilley* for the appellant.

Griffith, Q.C, cited the following cases:— *Lord Cholmondely v. Clinton, 19 Ves. jun., 261; Robinson v. Mullet, 4 Price, 353; Beer v. Ward, Jacobs' Reports, 77; Britchenow v. Thorpe, Jacobs' Reports, 300; Hutchins v. Hutchins, 1 Hogan's Reports, 315; Biggs v. Head, Sausse & Scully, 335*, which was followed in *Hobhouse v. Hamilton, Sausse & Scully, 359*, and in *Magawly v. Brady, Keon v. Nesbitt, Sausse & Scully, 365, note*, and in *Waller v. Fowler, Sausse & Scully, 369, note; Johnson v. Marryat, 2 C. & M. 183; Grissel v. Peto, 9 Bing, 1; Davies v. Clough, 8 Simons, 262; In re Holmes, 25 W. R., 603.*

Harding, J., referred to *Parrat v. Parrat, 2 De G. & S., 253.*

Garrick, Q.C., and *Power*, for the respondent.

Power submitted that:—1. This was not Mills' application at all. 2. The application was not made for the benefit of Mills; that it was merely a fight between the Solicitors, Morgan and Marsland.

Lilley, C.J,, said that the facts material to their judgment in this matter were few. It appeared that Mr. Marsland had been acting as the town agent of the country attorney who had been retained by Mr. Mills, the plaintiff in this case. He was not merely town agent, but seemed to have been active in the investigation of the plaintiff's claim, and proceeded so far in the matter as

to give an opinion on it. The relation, therefore, was that of attorney and client—it went beyond the mere agency of the country attorney. His Honor thought they were bound under such circumstances to assume that he had received confidence from his client. If there were any difficulty in the way of that assumption they need only fall back on one or two facts disclosed in Mr. Marsland's own communications. There was the letter of February (exhibit B) in which he, writing for his firm, said that he had learned from Mills full details of the matter: and then there was the other little scrap in which he said he did not ask any money from Mills, "because we have not had occasion to do anything beyond confer." They knew from their experience that conference must be confidence, and in that confidence there was the relation of attorney and client. He (the Chief Justice) was disposed to hold the duty of the attorney towards his client somewhat strictly. That relation existed in this instance, and was afterwards determined by an act over which the client had no control whatever. Edwards and Marsland appeared to have dissolved partnership. Then Mr. Marsland proceeded to Charters Towers Gold-field, and there it appeared the defendants, the Day Dawn Block Gold Mining Company, retained him as their solicitor. That relation was attempted to be continued against the protest of Mr. Mills' solicitor. Now at the time he (His Honor) was speaking of, the attorney's interest—having accepted the retainer of the Day Dawn Company—was clearly to serve them to the best of his ability; his duty was not to disclose the confidence which had been reposed in him by his previous client, Mr. Mills. His interest and his duty were clearly opposed the one to the other. His Honor did not think for a moment that Mr. Marsland would conscientiously do any wrong, but it might happen that in an unguarded moment he might let fall something which would injure the interest of Mr. Mills, and which would amount to a breach, although an unwitting breach of his duty. It was needless, after the numerous cases cited, to review the authorities for the purpose of showing jurisdiction. It rested on this, the court kept a firm control over all its officers, and would restrain them from doing anything inconsistent with their duty to their clients. It was the duty of the attorney not to place himself in such a relation as might lead to there being even an unwitting breach of duty. Here they found a man retained by a party who was in direct opposition to the interest of his client, an interest upon which he had previously actually advised, and Mr. Mills was therefore entitled to the protection of the court. Upon the main question, whether any confidence had in fact been imparted to Mr. Marsland by Mr. Mills, there was a conflict of testimony. If they (the judges) were to insist upon actual proof of the existence of such confidence, and to insist upon knowing what it was, and whether it was likely to prejudice a client's interests, they would compel him to strip himself of the protection which the court usually afforded, and the whole mischief he wished to avoid might arise. As it seemed to him, on the one side the client insisted on oath that he had imparted confidence to Mr. Marsland; and, on the other side, the solicitor said, "I have no confidence." How could the court decide it? If they took the oath of the attorney against the oath of the client, and refused the protection which the client sought, why, then, the matter might proceed, and the mischief which the client feared might arise, and the court could afford no remedy. In cases of this kind less mischief would accrue through granting the protection sought than in accepting the oath of the attorney against the client. The client's interest should prevail, and the judge should refuse to determine the matter on the conflicting testimony of affidavits. Taking that view he thought the order should be made absolute. This matter had come before the court by way of rehearing, in that a considerable amount of new matter was introduced, especially some further authorities. He thought the parties below should have insisted that it was not for the judge to determine the conflict of facts, but that he should have decided that the client had made out a *primâ facie* case for his protection. One principle that could be drawn from the case was

the *primâ facie* one that if an attorney was discharged by his client, or if he discharged himself, and the opposing party took him up, it was not a very violent presumption to conclude that he was engaged in the hope that something might be got out of him which had been imparted by his previous client. This was the first case of the kind that had been brought before that court, and it might be well to run over a few of the deductions that might be drawn from the numerous cases which had been cited. In the first place, it was clear from the decision he had just delivered that the solicitor might be restrained from acting; secondly, the new client might be restrained from employing him, from leading the attorney into a position from which injury to his former client might arise. And thirdly, that if there was no confidential communication there would be no restraint imposed. If there was any evidence of confidential communication, such as there was here, the court would not enter upon a judicial inquiry whether it was true or false. If it was false there was the usual remedy of an indictment for perjury. It was also clear that where there was evidence of confidence the court would not ask for a particular disclosure. And lastly, the court would not weigh conflicting testimony as to confidence, when the client swears he has made confidential communications. If the attorney had been allowed to act against his first client it might, in some cases and under some circumstances which did not appear in this case, be considered equivalent to a discharge, and the court might refuse to restrain; but not if there was any evidence that he had received confidential communications. Therefore the order would be that the client be restrained from employing the solicitor, and the solicitor from communicating any information to the defendants, and for that purpose the order below discharging the *nisi* would be reversed. The appeal would be allowed, and the rule *nisi* made absolute; no costs to be received or paid by Marsland; costs of plaintiff and defendant below to be costs in the cause; plaintiff to have costs of appeal as against both respondents.

Harding, J. My mind has been running in the same groove as that of The Chief Justice during the hearing of this case, and I do not think it necessary to add anything to the judgment which has just been delivered.

Pring, J., said that although the effect of the judgment which he thought it his duty to pronounce that day would overrule the order discharging the rule of the 3rd March, nevertheless, after hearing the arguments in the case, he concurred entirely in the remarks made by the learned Chief Justice. It had been laid down by both his learned brothers that the court would not determine on the balance of the testimony between the parties in cases of this kind. Now, when he was called upon in this matter, when cause was being shown against the order *nisi*, it appeared to him that he was to decide upon the balance of testimony on the evidence laid before him on affidavit, and according to the best of his judgment to determine whether Mr. Marsland, as an officer of the court, was about to do something wrong, not amounting to misconduct, but something which, as an attorney, he ought not to do. He now found he was wrong, and in concurring in the judgment delivered he was in no way disconcerted at finding he had taken a wrong view because he was somewhat misled in the matter. He did not throw any slur on the learned counsel who took their own course; but if he had had the present judgment of the court before him he should certainly have acted differently. He could only add that he thought the remarks of the learned judge unanswerable, and that he concurred in the judgment.

Solicitor for plaintiff, *Thynne*, agent for *Morgan*, Charters Towers.

Solicitor for defendants, *Chambers*, agent for *Marsland*, Charters Towers.

KENNEDY *v.* NEILL.

Gold Fields Act of 1874, sec. 74—Special Case—Nonsuit.

Counsel cannot refuse to be nonsuited when the matter is one of pure law; but where the matter consists of a question of mixed law and fact, counsel can insist upon it

going to the jury. The rule as to nonsuit is not changed by the fact that the judge is discharging both the functions of judge and jury. Actual personal occupation by the owner of a residence area is not necessary; he may occupy by his servant or agent.

This was an appeal under sec. 74 of the *Gold Fields Act of 1874*, from an order of the Central District Court, holden at Gympie, made October 29th, 1881, upon an appeal under section 72 of the said Act from the Warden of the Gympie goldfields. The plaint sets out the following facts:—On the 26th January, 1874, George Neill, the respondent and defendant in the suit, being in occupation of a residence area on Caledonian Hill, sold the same to one William Scott. William Scott applied and was registered owner of such area. George Neill was permitted to have the use and occupation of the said area. William Scott became insolvent, and his trustee assigned the said area and other property to John Kennedy, the appellant and plaintiff in suit. John Kennedy after notice sued the defendant George Neill, for the possession of such area. George Neill by way of defence pleaded there never was a sale to the plaintiff, or Scott—that the area always was the defendant's, and that he never was a tenant of the plaintiff.

Mr. District Court Judge Blake, when the appeal came on before him by way of hearing nonsuited the plaintiff upon a point raised at the time by the Attorney-General, viz:

"That the appellant had shown no title in law to dispossess the respondent."

The plaintiff gave evidence of the facts set out in the plaint. The counsel for the plaintiff resisted being nonsuited, and pressed his right to have the matter proceeded with. The question for the Supreme Court was as follows:—

"Was the District Court Judge right in nonsuiting the plaintiff?"

Griffith, Q.C., and *Sheridan*, for appellant.

Griffith, Q.C., cited *Reardon v. Norton, 5 Victorian L.R, Mining cases, 12;* and *Somers v. Cooper, ibid 22.*

Cooper, A.G., and *Power* for respondent.

The *Attorney-General* cited *Warrior Co. v. Cotter, 3 Wyatt Webb & àBeckett, 95; Jones v. Joyce, 3 Australian Jurist Reports, 105.*

Lilley, C.J.:—So far as we can gather from the special case, the judge appears to have acted upon the objection taken by the learned Attorney-General, that the plaintiff below, the appellant here, John Kennedy, had shown no title in law to dispossess the respondent. It is not disputed by the Attorney-General here to-day that there was evidence of title. Under these circumstances, the proper course for the judge, although sitting alone, and discharging the functions of judge and jury, was to have given a verdict for the defendant if there was evidence to satisfy him that the proof of title had been displaced by cross-examination, or in any other way. The rule as to nonsuit or verdict was not changed by the fact that the learned judge was discharging two functions. If there had been no evidence of title then the proper course would have been to nonsuit. If it was a pure question of law to be determined by a judge only, or to be determined by a jury under the absolute direction of a judge upon a question of law, then it was for the judge to decide it, and a nonsuit would have been the proper course if he rightly determined the question of law in favor of the defendant. If it was a mixed question of law and fact and the matter of fact was such as could not reasonably be submitted to a jury, then a nonsuit would be the proper course. But where as in this case there was evidence of title it was the duty of the judge to have called upon the defendant to cut down that evidence. The nonsuit was improperly entered under the circumstances. If the judge had been sitting with a jury, as there was evidence, and it seems to me reasonable evidence of title, the case should have been left to them. I do not think there was *laches* on the part of the defendant's counsel, Mr. Griffith; he appears to have pressed his right to have the matter proceeded with and to have resisted the nonsuit. A pure question of law is entirely in the discretion of the judge. Under the old rule counsel could refuse to be nonsuited,—but not, I think, when the matter is one of pure law. Where the matter consists of a question of mixed law and fact then the right would probably be

conceded that the counsel called upon to submit to a nonsuit should have the right to say that it must go to the jury. I am never willing to discharge counsel from the responsibilities they ought properly to take, and I think if counsel submitted to a nonsuit, the matter would not afterwards be considered by the Court. The only question of any importance remaining which has been raised is the question of residence—whether actual personal occupation by the owner of a residence area is necessary? I think, looking at the statute and the regulations, that it is not. I think he may occupy by his servant or agent. The very nature of the title—business area—shows that a residence area can be used as a business area upon obtaining the additional license the law requires. Under such circumstances it is perfectly obvious that he might be carrying on a business by his agent or manager. When we look at the latter part of Rule 33, of the General Regulations of 1880, it becomes still more palpable that a man may be the owner but not the physical occupier of a business area. The latter part of that rule has been read and is as follows:—"The holder of a miner's right shall be allowed to hold only one residence area on any one gold-field." The only construction is, that a man may hold a residence area upon any number of distinct gold-fields, but it could hardly be contended that he could reside upon them all. The case of *Fisher v. Tully*, decided that residence meant—to live in the ordinary course of one's business avocations. The word used here is occupy—occupy for the purpose of residence or business, and I find nothing in the Act or Regulations contrary to the ordinary rule, that where a man possesses anything, he may dispose of it in any way which he considers best to carry out his own business arrangements—he may let it, assign it, or he may carry on his own business on the residential area by means of his deputy if he thinks fit. If any restraint had been intended it would have been expressed either in the Act or the Regulations. Here we have the evidence of title by the person who claims his right from the original owner. In this case I think there was cogent evidence of title which disentitled the judge to nonsuit. The appeal will be allowed, judgment below reversed, new trial ordered, respondents to pay costs of appeal; costs below to be left to judge.

HARDING, J.:—The opinion I have formed coincides with the judgment of the Chief Justice.

PRING, J.:—I concur in the judgment.

Solicitors for appellant, *Wilson & Wilson*, agents for *Tozer*, Gympie.

Solicitor for respondent, *Chambers*, agent for *Power*, Gympie.

REGINA *v.* BYRNE.—*In re* SWANWICK.

THIS was a special case reserved for the opinion of the Court on the application of the prisoner's counsel, *Swanwick*. The prisoner had been convicted of rape, and sentenced to death. The points raised were that: (1) The evidence of a witness in the case was inadmissible. (2) An application for the postponement of the trial on the ground that a material witness for the defence was absent, was refused. (3) That the judge, in attacking the character of the counsel for the prisoner, had virtually misdirected the jury.

The *Attorney-General* appeared for the Crown. *Swanwick* who did not appear for the prisoner, was ordered by the court to attend in the afternoon; and in the afternoon, upon his non-attendance, the judgment of the court below was affirmed.

Swanwick was called upon to show cause why he should not be suspended from practice on account of his conduct.

LILLEY, C.J.:—When this question of conduct first arose before the learned judge in the court below, Mr. Swanwick had notice that his conduct would most probably be brought before the Full Court, or rather, as my brother Harding informs me, that a persistence in the general misconduct which he had exhibited before the learned judge would at some time be reported to this court, if continued. He had been sent for and had absented himself, and he was not present when that statement was made by the learned judge, probably

absent from the same feeling of contemptuous indifference to the authority and dignity of the court which he seems to have very frequently exhibited. The matter of his conduct in this particular case of *The Queen v. Byrne*, is embodied in the special case reserved by the learned judge, and a copy of that was served on Mr. Swanwick personally. He, therefore, had ample notice that his conduct would be submitted for the consideration of the Full Court. On Tuesday he absented himself, probably from the same feeling which he seems to have entertained towards the authority of the court, and notice was sent to him by telegram that the matter would come on for consideration at half-past 2 o'clock last Tuesday afternoon. It was said he had gone to Roma. We had no means of knowing the movements of the gentleman who seems to care very little about what we do or what we think about his conduct. It appears, however, that he had gone to Roma, and we know he received the first telegram, and although it was impossible for him to be here at half-past 2 o'clock on that day, it was possible for him to have taken the train on Wednesday morning and to have been here to-day to answer the order of the court for his attendance, and to show cause why he should not be further suspended. On Tuesday evening at half-past 10 o'clock, he received another telegram with a further order for his attendance to-day, and he knows that he is under suspension from practice. He has failed to attend to-day. It was quite possible for him to have been here, but it was not possible for him to have done any benefit to his clients by remaining at Roma, and any attempt to exercise his functions as a minister of this court would have been a further contempt for which some further punishment would no doubt have been administered if he had failed to attend to the injunction of the court to cease to practice. There can be no doubt whatever, and we wish it to be fully understood, that we have jurisdiction to deal with the conduct of the ministers and officers of the court, that conduct of course being only subject to our control so far as it relates to their professional duties. I use the word minister because I am not desirous to place the members of the bar on the same footing as mere officers of the court. I am satisfied that there is not a member of this court who is not anxious to uphold the dignity and usefulness of both branches of the profession, but that will be quite impossible if the members of the bar, the attorneys, and the officers of the court do not regard the dignity of the bench, and above all, the usefulness of the institution whose powers we are here merely to administer. The court does not exist solely for its officers, but for the public benefit, for the due, respectable, and quiet administration of justice. If we permit the advocates or the officers of the court to attempt to pervert the course of justice we shall fail signally in the discharge of the very high duties which the public have committed to our care. I have gone over this case carefully. There seem to have been a constant course of disrespect towards the learned judge, which might have interferred most seriously with the ordinary discharge of his duties in court. A judge has the most serious, most arduous, the most anxious duties to perform. The advocate has no doubt serious responsibilities upon his shoulders but they are not so serious as those of the judge. The advocate has to work with earnestness, with energy, and with the utmost faithfulness for his client to put his case before the court for its consideration, but to admit that it is any part of the duty of the advocate to endeavour, by disturbing the proceedings of the court, to mislead the judge in his functions, would be to concede to the advocate what has never yet been conceded in any British court of justice. No one in the world will be readier than myself, and my colleagues to give full scope to the advocate, but when a member of the bar proceeds further and by colourable applications for adjournments seeks delay, covering possibly some other intention, and possibly with some idea of preventing the due administration of justice, it is time the court interfered and exercised its authority. We know well that when so serious a matter is before a judge as the life or death of a prisoner, there is a powerful strain on the judge's feelings, and any apparent desire to play a trick upon him, to place him in a false position, to mislead him if possible, to lead him to do or neglect to do something which might affect the life of the prisoner; places upon him a powerful restraint, and may possibly mislead him; and if the judge should be so misled a man who deserved conviction might escape, or an innocent man be convicted which would be still more serious. It is the duty of a high-minded advocate to assist the court, to discharge his duty to

his client within the law and no more. There are some gentlemen at the bar, I hope, many of them, preparing themselves to perform the high functions which we discharge, and it is only by firmly upholding the honor and dignity of the bar that we can hope to see worthy successors following in our footsteps. So far as I am concerned I shall be unflinching in the discharge of this duty. Mr. Swanwick has not only been guilty of gross misconduct in his refusal to cross-examine under the pretence that he could not further safely do it; not only was there an attempt to place the judge in the difficult position which I have indicated, but in throwing down the piece of paper on the table of the court, and neglecting to bring sharply before the judge *riva voce* the points he considered favorable to the prisoner, he neglected to discharge a most important duty to his client and the court. It was possible that those points might through this neglect have been overlooked. Had that trick succeeded, as trick we must regard it, an appeal might have been made to the Executive to remit the punishment inflicted on the prisoner, which may or may not be deserved, but I express no opinion on that point. The greatest peril to the prisoner and the court might have been caused by Mr. Swanwick's conduct on this occasion. Painful as the matter is to me, painful as it undoubtedly is to the court to inflict punishment upon any officer or minister, of this court within the range of our jurisdiction, it is clear we must not fail in the discharge of our duties and inflict punishment in this instance. Then we have the observations addressed by him to the jury, which seem to me to be only part of the same course of deliberate misconduct, deliberate and contemptuous disregard of his duty towards the court. My attention has been very properly drawn to the details of his address to the jury. He told the jury that in consequence of some remark of the learned judge, he found himself compelled not to cross-examine any further, and that if he had continued the cross-examination very material evidence might have come out. Now that embodies two things, first a charge of corrupt and improper feeling on the part of the judge, and no one who knows my brother Harding's constant anxiety to discharge his duty faithfully, would believe for a moment that he could be actuated by any animus against a man whom he had probably never seen before in his life. This observation embodies also another attempt to act trickily with the court. It was a statement to the jury that there was matter behind, that the whole matter was not before them, and they were not in a position to determine the case. No advocate has ever been allowed in any court of law within my observation or reading to attempt a trick of that kind; if it ever has been resorted to, I can only say it is one of the lowest arts of advocacy, and should meet with the immediate and severe punishment of the judge. It places the judge in a false position, for if he condemns it severely, a feeling might arise in the minds of persons unaccustomed to the proceedings of courts, that the judge was not dealing with perfect impartiality towards the prisoner. I have only to add that we order Frederick Ffoulkes Swanwick to be suspended from practice in all its forms and every capacity in this court until further or other order. If he wishes to be restored to his status in the exercise of his profession he must come here and make a proper submission, and make his conduct clear in the future. What punishment by way of fixed suspension we may inflict upon him, is a matter for the future. No application will be taken notice of unless served in proper form, on the Crown Law Officers. This order is to be sent to all courts in the colony.

This suspension extends not only to appearing in court, but to the exercise of any function as a minister of the court, even to the giving of advice; it extends to his extinction as an officer or minister of the court. The public must take notice of this judgment.

HARDING, J.:—It is unnecessary for me to add anything to the judgment which has just been delivered, my opinion upon the subject having been freely expressed as the occasions arose, therefore I do not think it necessary to reiterate them. I still continue of the opinion I have already expressed and agree with the judgment already delivered.

PRING, J.:—I agree with all the remarks of the learned Chief Justice, and it is unnecessary for me to add anything to them.

END OF VOL. I., PART I.

FULL COURT.

April 4th, 1882.

CORLEY *v.* CHIPPENDALE.

Statute of Frauds.

The words "*value received*" in an agreement required to be in writing by the Statute of Frauds, are not a sufficient statement of the consideration within the provisions of that Statute.

AN appeal by way of special case from the decision of Mr. District Court Judge Blake. The action was brought before the said judge and a jury of four at Gympie, in an agreement as follows:—"Memorandum of agreement made this fifteenth day of April, 1881, between William Chippendale of Bunya Creek, near Gympie, in the colony of Queensland, and James Corley of the same place, witnesseth the said William Chippendale hereby agrees to sell and the said James Corley hereby agrees to buy all the silky oak timber on the said William Chippendale's land for value received and the said William Chippendale hereby agrees to give the said James Corley a road through the said William Chippendale's land for to saw the timber." This agreement was signed by William Chippendale, and witnessed. The defendant set up by way of defence no consideration, Statute of Frauds, and no breach. The plaintiff's evidence went to show that he was living on the land, and that he was to have the silky oak timber, and the defendant the crops. The plaintiff had cut three trees before he got notice not to remove timber or trespass. At the close of the plaintiff's case, counsel for defendant applied for a nonsuit on these grounds:—(1) The agreement sued on did not satisfy the requirements of the Statute of Frauds, and no agreement was shewn upon the evidence, legal or sufficient, with reference to the Statute of Frauds, because in memorandum of agreement put in evidence there is no sufficient statement of consideration. (2) That the real agreement was not reduced into writing. The judge refused to nonsuit, and at the close of the defendant's case, submitted the following questions to the jury, and received answers as below.

(1). Was there any consideration for the promise to give the plaintiff the timber? Yes.

(2). If so, what was it? For plaintiff's interest in the crops and farm.

(3). Was the promise procured by misrepresentation? No.

(4). Was there any breach of it? Yes, with a conditional waiver, followed by another breach.

(5). What damages? £100.

There were several questions left for the opinion of the Full Court, the first of which, only, is material, viz.:—Ought the learned judge to have nonsuited the plaintiff?

Griffith, Q.C., and *Rutledge*, appeared for the appellant; *Cooper, A.G.*, and *Power*, for the respondent.

Griffith, Q.C., submitted that the whole agreement between the parties was not in writing, that the consideration must be stated, and the jury found that the real consideration was the giving up of an interest in land. The only statement of consideration in the alleged agreement, were the words "*value received*," and those words he contended were not a sufficient statement of the consideration within the provisions of the Statute of Frauds, and in support of his argument, he cited the following cases:—*Kelly v. Webster, 21 L.J., C.P., 163; Acebal v. Levy, 10 Bing., 376.* He was then stopped by the court. *Pring*, J., referred to the case of *Marshall v. Green, L.R., 1 C.P.D., 35.*

The *Attorney-General* contended that the agreement had been fully preformed by the respondent and partly by the appellant, that possession of the farm was given up by the respondent, who, while in possession, had planted 16 acres with corn, and that the giving up of the crops was the true consideration, and that it was performed; and further, he was allowed to go on to the appellant's land and take some of the silky oaks which were cut after the contract, and the cutting of them could only have been referable to the contract, and in support of his argument, he cited the following cases:—*Coles v. Pilkington, L.R., 19 Eq., 175; Alderson v. Maddison, L.R., 7 Q.B.D., 74.* As to whether the words "*value received*" were a sufficient statement of the consideration, he submitted that there was no case on the words, but that the words meant

"*for a valuable consideration,*" and he cited *Bateman v. Phillips, 15 East. 270;* and *Ashcroft v. Morain, 4 M. & G. 454,* where the words "*moderate terms*" were held to be a sufficient statement of the consideration with parol evidence to explain them.

Griffith, Q.C., in reply submitted that the acts relied upon as part performance must be of such a nature as to be distinctly and exclusively referable to a contract, and that the cutting of the trees in this case were just as probably referable to the license to cut them contained in the so-called written agreement as to the alleged agreement set up by the respondent. The point as to giving up possession, was answered by *Kelly v. Webster.* He referred to Lord Cranworth's judgment in *Caton v. Caton, L.R. 1 Ch., 127.*

LILLEY, C.J.:—Looking at the agreement, I think it is clearly an agreement relating to the sale of an interest in land, and that the writing does not set out the actual agreement between the parties; that being so, the question arises and it seems to me that the acts relied upon are entirely consistent with a leave and license to take timber. Therefore, upon both points, I think the learned judge ought to have nonsuited the plaintiff. It is not necessary taking the view we do to answer the other question. The first disposes of the whole matter.

HARDING, J.:—I think the first question ought to be answered in the affirmative; and I do not see any necessity to consider anything further.

PRING, J.:—I am of the same opinion.

Appeal allowed with costs; nonsuit to be entered in the court below.

Solicitors for appellant, *Wilson & Wilson,* agents for *Tozer,* Gympie.

Solicitor for respondent, *Chambers,* agent for *Power,* Gympie.

May 9th, 1882.

Re SWANWICK.

Swanwick appeared before the Full Court, and after making a full and ample apology to the court, and assuring it that no disrespect was intended, and promising that in future the judges would have no cause to complain of his conduct, his suspension was removed. Their Honors addressed him as follows.

LILLEY, C.J.:—Assuming your conduct, Mr. Swanwick, to have been such as to justify the complaint of the learned judge, I could make no further or other observation than I did on the occasion of your suspension at the last sitting of the Full Court. I have had occasion before to say that the judges leave their position and reputation, their honor and their dignity, to the protection of the public opinion of the colony. We rarely complain of anything like mere personal disrespect, but we have a trust committed to our hands which we must by no means suffer to be broken in upon or perverted. We have only one desire, which is, that we may be enabled to discharge our functions before the whole world without fear, and without any influence or interruption that may bring disaster on anyone who has to appear before us. I will leave your explanation to the world—you shall have the full benefit of it. I will make no analysis of it, but leave it entirely to the judgment of your fellow colonists. If they are satisfied, I shall be satisfied, and I am sure my brother judges will make no complaint in the matter. Probably what has happened will not do you any very serious harm if you hereafter conform your conduct to the honorable traditions of the noble profession to which you have been admitted. I am perfectly aware —and my brother judges have long been aware —of all the trials of temper and of all the difficulties that meet the advocate in the fearless discharge of his duty, and I am sure not one of us would be willing to do anything that would take away from the advocate his courage or deprive his client of the full exercise of his skill. In my experience, I have never found any advantage accrue from trying the patience of a judge. It is far wiser to allow the proceedings of the court to go on with calmness and dignity. The skilled advocate needs no resort to trickery. The art of the advocate is one of the highest and noblest in the hands of a master, and the greatest masters

have been those who have been courteous towards judges, who have listened to them with patience and courtesy, and who would be the last to resort to anything like insult or personal disrespect towards them. I hope your submission is as sincere as I am bound to say it is ample. I believe every member of the bench has entertained towards you the kindliest feelings, indeed towards every member of the bar our feelings are of the kindest, and we shall ever feel a strong desire to see a reputable, dignified, and able bar before us, the more able the better. For myself and my brother judges I can only say, that we are not at all jealous of the high ability of the advocate, or of the public reputation he may attain by the exercise of his skill. To me it is one of the most agreeable things in the world to see a case handled with skill and eloquence. For the future we can only have the guarantee of your own expression of contrition and resolve, I hope, of amendment. You will receive the same courtesy which has always been extended to you by every member of the bench. Nothing that has happened will I am sure affect our minds unfavorably towards you; your clients will not suffer in any respect from any mistake you have made in your conduct in your profession. Whatever disputes or differences may exist between you and your brethren at the bar we know nothing of, and will not interfere with, unless they involve professional misconduct, and call for condemnation. So long as you exercise your functions under the statute passed by the Legislature you will be entitled to our support. No combination for the purpose of defeating that statute will receive our countenance, but, on the other hand, will receive our condemnation, and punishment if it be so exhibited as to justify punishment. Your suspension no doubt has visited you with severe punishment. Had you not fully submitted yourself to the court it would probably have been of a different character and more severe. It should be known that we have the power of removal as well as suspension, and that that power will be exercised if necessary. Your suspension is removed.

Harding, J.:—I agree with the remarks of The Chief Justice, and find it unnecessary to reiterate them. Possibly it may be advantageous to explain my opinion upon a certain part of the case, independently and incidentally. It has been suggested that observations could be made at the bar which might have the effect of prejudicing the judge—I think it is not so. The making of an observation before a judge which might prejudice him outside as a man, would have a different effect upon him sitting as a judge, knowing that he is exercising an important office. The only way in which such remarks could have any effect, would be by causing an over caution. But the moment observations are made which tend to prejudice the office of the judge, it is, I think, his duty to deal with it at once. Another matter which has been referred to, is the recent step taken by the Legislature amalgamating the two branches of the profession. Until that Act became law, no one was more strenuously opposed to the principle than myself, but since the Act passed, I am not here to express any opinion upon the matter but to carry out the desire and enactment of the Legislature, and were I at the Bar, I should consider it my duty to bow to the enactment, and not only to respect the law and to carry it out, but also to respect those who took advantage of it. The points which came before this court in the case of *Reg. v. Byrne*, came before it at the request of Mr. Swanwick, and though I felt that no miscarriage of justice had taken place in that case, I reserved them for the consideration of this court as I am bound to do at the request of counsel whatever my opinion upon it may be. It must not be understood that I feel it necessary to come to this court for its assistance in matters of this kind, but shall deal with them, should the necessity arise, myself.

Pring, J., concurred.

Suspension removed accordingly.

LILLEY, C.J. May 9th, 1882.

BULLEN *v.* SOUTH NEW ZEALAND GOLD MINING COMPANY, (LIMITED).

The Companies Act 1863—Forfeiture—Waiver—Acquiescence.

THIS case was heard before His Honor The Chief Justice, without a jury, on the 17th and 18th of April last, when judgment was reserved.

The *Attorney-General* and *Noel*, for the plaintiff; *Griffith, Q.C.* and *Sheridan*, for the defendants.

Cases quoted:—*Blyth v. Dennett, 22 L.J, C.L., 79; Knight's case, L.R. 2 Ch. 321; Woollaston's case, 4 DeG. & J., 437; Webster's case, 32 L.J., Ch. 135; Pordage v. Cole, Williams Saunders, Edit. 1871, 552; Edit. 1844, 323; Moore v. Rawlins, 6 C.B., N.S., 289; Carr v. London & N.W. Ry Co., L.R. 10, C.P. 307; Pickard v. Sears, 6 A. & E., 469; Phillips v. Jones, 15 Q.B. 859.*

The facts appear sufficiently from the judgment.

LILLEY, C.J.:—This action is brought for the recovery of 1,800 shares, or, in the alternative, for the value of the shares, alleged to have been the property of the plaintiff, and to have been improperly forfeited and sold by the defendant company. The nature of the relief asked for and the precise form of the pleadings are immaterial, as the parties agreed that all the facts were before me, and that the case might be decided without regard to mere technical form in these particulars. The case was placed before me with candour, and argued ably on both sides. The plaintiff was one of the original members of the company, and his name remained on the register of shareholders until the 9th October, 1880, when the shares were put up for sale by the company and purchased for their own use. Subsequently the shares were allotted amongst the defendant shareholders, except Cowell, who purchased from the executors of an original allottee. The plaintiff had been frequently unable to pay calls upon his shares, but in June, 1880, there were none unpaid. On the 29th June, 1880, another call was made. These calls have never been paid. It is for the non-paymet of them the defendants allege the shares were properly forfeited and sold. In respect of each of these calls the defendants contend there was a forfeiture of the shares under their Article of Association No. 17, which prescribes that "any shares upon which a call shall at the expiration of fourteen days after the day appointed for its payment be unpaid shall thereupon be forfeited without any resolution of directors or other proceeding." The plaintiff, however, contends that it is essential to the forfeiture, under the same article 17, that "the share or shares when forfeited shall be sold by public auction not less than twenty-one nor more than twenty-eight days from the day of forfeiture," and that as the sale of the 9th October was too late if made on the June call and too early if made on the August call the forfeiture and sale were void. The defendants' reply is that the time of the sale did not constitute a condition precedent to nor was it of the essence of the forfeiture, that it related entirely to an act to be done subsequent to a forfeiture and could only possibly entitle the plaintiff to damages if he had sustained any by the irregular conduct of the defendants in regard to the time of sale. The plaintiff rejoins that the defendants, by their breach of the regulation in this respect, deprived him of his right to redeem under article 18, which declares that "notwithstanding anything hereinbefore contained, any person, a share or shares belonging to whom shall have been forfeited as aforesaid, shall be entitled at any time up to one hour before the advertised time for the sale of the shares to redeem the said shares, by payment of calls, &c., &c., and he shall thereupon be entitled to the shares as if the forfeiture had not been incurred," &c., &c. Our first step must be to place a correct construction upon articles 17 and 18 in relation to forfeiture. The cases cited by defendants' counsel afford no aid on this branch of the discussion; they were all decided on articles forfeiting the shares to the use of the company, or declaring that when forfeited the shares should become the property of the company, but containing no right of redemption by the defaulting shareholder. The true interpreta-

tion of the articles 17 and 18 in this case appears to be that there was in respect of the first and second calls a forfeiture by each non-payment *ipso facto*, but not an absolute forfeiture; it is merely for securing the payment of the calls, with a power of sale also for that purpose. The shareholder's interest is not extinguished, but he is entitled to the surplus of the sale moneys after payment of the calls and expenses. This being so, the English cases cited by defendants' counsel with a view to show that irregularities or omissions by the company subsequent to a forfeiture do not affect or invalidate it, are inapplicable to the circumstances of this case, or at least afford no help towards its decision, because, as I have shown, in those cases the shareholder had by the forfeiture ceased to have any interest in the shares. Any omission subsequent to forfeiture was, therefore, immaterial. By article 21 the company has a lien on the shares for any calls due to them from the shareholder. The calls under the combined articles become a specialty debt, to be realised by sale or sued for by action. The nearest analogy to the position of the company and a defaulting shareholder would be that of a mortgagor and mortgagee, with a power of sale. The forfeiture of the estate for non-performance of the condition of payment, with power of sale also on default, each of them for securing the payment of the debt. The articles constitute a specialty contract beween the shareholders and the company, and the power of sale must be exercised in pursuance of its express terms. *(Bronard v. Dumaresque, 2 Moo. P.C., 457.)* I have shewn that the sale was not within the terms of the power in respect of either of the forfeitures. The result is that though the forfeitures might be subsisting even now, the right to redeem has not passed away from the plaintiff, the sale was unlawful and void, and he is entitled to have his shares back on payment of the calls, or to have damages for the loss of them. The plaintiff however, has further urged that there was a waiver of the forfeitures. I think the evidence sufficiently establishes this contention. The following facts induce me to accept this conclusion:— The defendants did not proceed to sale in due course under the articles; they retained the plaintiff's name on the register of shareholders, and, of course, his liability as a shareholder to the company and others; they required payment of the first and second calls, and of a third call made in September, upon which the defendants do not found any defence; and on the 1st October they passed a formal resolution that the shares of the plaintiff be forfeited. Up to that time, which is after all the calls and forfeitures, it is clear there was no intention to pursue the forfeiture, or to regard the shares as forfeited. The plaintiff had been many times in arrear, and had afterwards paid up his calls. The course of dealing with him by the company was a succession of waivers of these forfeitures. The concern was a struggling one without profits, and anxious probably to retain such contributors as it had, and not to drive them away. On the 26th July, they threatened him with legal proceedings for the recovery of the calls. There can be no mistake about the meaning of this language; it does not mean forfeiture and sale of his shares, but merely that he will be sued for his debt to the company. Moreover, on the 8th November, the company resolved that for the future the directors strictly adhere to the articles. This indicates that the course of dealing had been not to press these forfeitures, and the sudden return to strictness arose doubtless from the show of gold which had been discovered in the adjoining Golden Crown claim. It was then probably of less consequence to have so many contributors, and so the company allotted the plaintiff's shares among their shareholders. The company had an undoubted right to waive these forfeitures if they thought it was to their advantage to do so. (See *Moore v. Rawlins, 6 C.B.N.S., 289*, and the cases cited in argument in *Webster's* case, *32 L.J., N.S., Ch. 135.)* Both upon the law and the fact, the plaintiff is entitled to recover, unless the defendants have proved their contention, that he acquiesced in the forfeiture and unauthorised sale, or that he

is by his conduct estopped from asserting his right to redeem or to complain of the wrongful sale. So far as the forfeitures are relied on I think neither the plaintiff nor the defendants regarded their shares as actually forfeited until the resolution of the 1st October. There is no evidence that the plaintiff had either knowledge or notice of that resolution. He knew that the shares were to be sold on the 9th October, and he did not protest; but then he knew, also, that the sale would be irregular and invalid, and he was not then in a position either to redeem or take proceedings to restrain the sale. He was well acquainted with the articles. He knew also that after the sale the shares remained in the hands of the company. Unless there was something in his conduct between that date and the 8th November, or subsequently, which amounted to acquiescence or estopped him, I see no other evidence that can fairly be regarded in that light or have that effect. By that time the company had removed his name from the register of shareholders, and in the meantime he was making efforts among friendly shareholders, and borrowing money, to get his shares back. He would have accepted a portion back, in fact, he was willing to compromise, but a man may be ready to give up a portion of his right without assenting to the title of his opponent to deprive him of it. The defendants allotted the shares amongst themselves on the 8th November, and on the 15th January, 1881, he, through his solicitor, claimed his right to redeem. He sued in the District Court, but the proceedings seem to have fallen through, and then he began this action. The time relied upon to establish acquiescence is, at the most, two months; but during that period he was in fact not quiescent, but was busily trying to get his shares back, and some of the defendants had in fact offered to return him or give him shares. He had claimed to be interested in the proceedings of the 9th November, in the matter of his shares, and he afterwards refused to purchase 600 shares at a low price because "he had given his word to the chairman to pay what he owed on his own." I can see nothing in his conduct towards either the company or the defendants, who became allottees of his shares, which amounts to acquiescence, or estops him from maintaining his rights. As to the defendant Cowell, there is no evidence that the plaintiff either knew him or did, or omitted to do, anything towards him which could mislead him, or induce him, to believe he had abandoned his claim. There is no evidence to justify me in holding that the plaintiff, either by act or omission, was guilty of culpable negligence or of anything to estop him from recovering what he has lost. My judgment is that the plaintiff is entitled to redeem or to have damages for the loss of his shares. Should he elect not to redeem but to take the damages, I assess the value of his shares at the time of the trial at 3s. 6d. per share, which will give him £315. I am looking solely at the circumstances before me, and not laying down any fixed measure of damage applicable to all future cases of this kind. Had an actual tender of arrears been made in January, 1881, the measure of damage would probably have been the highest price of the shares between that time and the date of the trial, that is £2 per share. I desire to add that not one of the defendants is in the position of a protected purchaser from the company under article 19. If he is, there is no evidence before me of the facts essential to his protection. There will be a declaration, if he elect to redeem, that the forfeiture was waived, that the sale was void, that the plaintiff is entitled to redeem, that the shares be transferred to him, that an account of profits be taken since June, 1880, and that the defendants pay them to the plaintiff, the defendant company being allowed to set off the calls due from plaintiff. Further consideration and leave to apply. If he elect to take the damages, judgment for plaintiff for £315. The plaintiff will have his costs.

Solicitor for plaintiff, *Chambers*, agent for *Power*, Gympie.

Solicitors for defendants, *Wilson & Wilson*, agents for *Tozer*, Gympie.

SOUTHERN DISTRICT COURT.

May 15th, 1882.

ERSKINE AND OTHERS *v.* BERGIN AND ANOTHER.

THIS was an action heard before Mr. Deputy Judge Chubb, at the last sittings of the Southern District Court at Ipswich, when judgment was reserved.

HIS HONOR delivered the following judgment in Chambers:—

This was an action for wrongfully entering upon and evicting the plaintiffs from a coal mine, of which they alleged they were in possession, under and by virtue of an agreement with the defendants, and for conversion of the plaintiffs' goods, to wit, slack coal, and for detention of the plaintiffs' goods, to wit, mining tools and coal waggons.

The defendants denied the eviction of the plaintiffs, and they alleged that the agreement had been rescinded; that they lawfully entered; that the agreement only amounted to a revocable license which they had revoked, and they denied the conversion and detention alleged.

By way of cross action, the defendants set-off a claim for damages arising out of the agreement, as follows:—

1. That the plaintiffs had improperly worked the seam of coal, and had negligently allowed the roof in parts of the mine to fall and choke the levels.
2. That the plaintiffs had failed to keep the agreed number of miners at work, whereby the quantity of coal raised was less than should have been raised under the agreement.

The case was tried before me and a jury of four at Ipswich, on 27th April last, Mr. Lilley appearing for the plaintiffs, and Messrs. Chubb and Cardew for the defendants.

Mr. Cardew submitted that the court had no jurisdiction, as the question of title of land arose. I reserved my decision on this point. The agreement upon which the plaintiffs relied was in writing, dated the 2nd July, 1881, and the material portions of it are as follows:—"We Denis Bergin and George Hunt do hereby agree to lease all those seams of coal contained in 21 chains by a line bearing east and west to a creek called the Bundamba Creek, west by east to a peg numbered 15, being by measurement 21 chains in length and no further, the same being a portion of 161, and by a line bearing north and south as the boundary of the outcrop of coal leads or takes its trend to from a peg marked 15 bearing south and bearing north 10 chains to a peg marked 5. The conditions are that we Denis Bergin and George Hunt aforesaid agree to lease as aforesaid the whole of those seams of coal and no more contained in the land as specified above, and we Denis Bergin ad George Hunt aforesaid do hereby agree and acknowledge that we have no right to those or any of those seams of coal we have leased or rented to the said Peter Erskine during the currency of this lease, and we Denis Bergin and George Hunt do hereby agree to lease or rent all those seams of coal as mentioned in the fore-part of this agreement for the term of seven years from the date hereof in conditions, that the said Peter Erskine and Sons pay to Denis Bergin and George Hunt aforesaid, their heirs and assigns, or their authorised agents, for all coal raised to the surface from the miners or from the said mine or mines, and we Denis Bergin and George Hunt have leased the above seams of coal on condition that we Denis Bergin and George Hunt do receive from the said Peter Erskine and Sons, at the rate of 1s. per ton, for all coal raised from the mine or mines, the same to be paid at the end of two weeks from the date and the signing of this agreement. And the said Peter Erskine and Sons shall at all times during the currency of this agreement keep not less than ten working miners below for the purpose of raising coals to the surface, including their own family."

At the close of the evidence Mr. Cardew submitted the following points:—

1. That the right to mine is an incorporeal right or hereditament, and can only be created by deed.
2. That the agreement proved, not being a deed, only amounts to a license revocable at will by the grantor.

He, however, conceded that if the plaintiffs had, on the face of the agreement, entered into possession of and laid out money on the property

the defendants could not revoke the license without compensating the plaintiffs for such expenditure; and he further contended that the plaintiffs were not entitled to recover for anything after the entry by defendants, which act was the revocation of the license.

After argument I reserved these points, and in accordance with my request the jury found the facts specially in answer to questions put to them by me. The findings of the jury were briefly as follow:—

1. The defendants evicted the plaintiffs on the 13th or 14th September, 1881.
2. The agreement had not been rescinded.
3. The damages for eviction, exclusive of money laid out on the property, were £159 19s. 9d.
4. The defendants converted slack coal of the plaintiffs to the value of £8.
5. The defendants detained the plaintiffs' mining tools. Damages for detention, £5.
6. The plaintiffs laid out money on the property and improved it to the value of £20.
7. The plaintiffs did not perform the condition as to the number of miners to be employed by them.
8. That it was physically impossible for them to do so for want of room.
9. The defendants waived this condition.
10. The plaintiffs did not improperly work the mine.

On these findings the plaintiffs are entitled to a judgment for the three sums of £8, £5, and £20, without question. Whether they are entitled to the £159 19s. 9d. depends upon the correct solution of the point taken for the defendants—namely, that the agreement is no more than a revocable license.

The nature of a license and its legal incidents are fully discussed and explained in the judgment of Baron Alderson, delivering the considered judgment of the Court of Exchequer in *Woods v. Leadbitter, 14 L.J., N.S., Exch., 161; 13 M. & W., 838:*—His lordship observes, "that no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed is a proposition so well established that it would be mere pedantry to cite authorities in its support," and further, "a mere license is revocable: but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol: and on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a *valid* grant, and it is therefore revocable."

If, however, the grant is good, the license becomes irrevocable by the grantor, and he is estopped from defeating his own grant or act in the nature of a grant. No doubt a mere license to get coal, which does not oust the grantor of his own right to dig for coal in the same land, is a mere incorporeal right, and must be granted by deed. And a lease of incorporeal hereditaments, as a lease of a right of shooting, was always required by law to be by deed, otherwise it is void. *Bird v. Higginson, 6 A. & E., 824*—"But a mine may be corporeal hereditament; for instance, if a mine be open and granted, the grant is of a corporeal hereditament."—*Preston*. Now every grant necessarily contains a license commensurate with the grant, and a lease for a term is a grant of an interest in land. The instrument in question in this case purports to be a lease of land—"coal strata"—for a term of seven years. It follows, therefore, if this instrument can be sustained as a valid lease it will amount to a grant of the coal for the period named containing necessarily a license to get and dispose of it, subject to the conditions of the lease; and the license then being incident to the grant is consequently irrevocable by the grantor during the term.

By the common law it was not required that a demise of land or any corporeal hereditament should be in writing. By our *Statute of Frauds and Limitations of 1867, ss. 2 and 3*, following the Imperial Statute, all leases, estates, interests

of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments not put into writing and signed by the parties so making the same, or their agents lawfully authorised by writing, shall have the force and effect of leases or estates at will only, except leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds part at least of the full improved value of the thing demised.

It has been popularly supposed here that leases exceeding the term of three years from the making thereof must be by deed. This is an error, and arises from the fact that in England there is a statute—the Act 8 & 9 Vict., c. 106—s. 3 of which enacts that leases required by law to be in writing of any tenements or hereditaments made after 1st October, 1845, shall be void, unless made by deed. This statute is frequently quoted in the text books, and has been taken for granted to have been adopted here, but we have not yet got it, and the law of this colony therefore does not require leases to be by deed. The present instrument, therefore, satisfies our statute, being in writing, and signed by the parties making the same.

Next, as to its form. Whether a particular instrument is a lease or a license does not depend upon the mere wording of it. The intention of the parties and the nature of the transaction must also be looked at. It may be remarked that the form of this instrument is not that of a license, and the words "lease," "leased," "rented," and "mine," occur more than once. In Bacon's "Abridgment Tit. Leases, K," it is said: "Whatever words are sufficient to explain the intention of the parties, that the one shall divest himself of the possession and the other come into it for such a determined time, such words, whether they run in the form of a license, covenant, or agreement, will in construction of law amount to a lease." It was not proved that the land containing the coal seams was under the provisions of the Real Property Act of 1861, consequently section 52 of this Act, which requires all leases for a term exceeding three years, to be in form E of the schedule to that Act has no application. Lord Cairns says that a mineral lease differs from other leases, and defines it thus: "A mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual for a specific length of time to go into and under the land and get certain things there if he can find them, and to take them away just as if he had bought so much of the soil." *Gowan v. Christie, L.R., 2 Sc. Appeals, p. 284.* Now I think that the instrument in question comes within these definitions, and is a lease and not a mere license. The subject matter—namely, certain defined and described seams of coal—is ascertained; the defendants divest themselves of the possession and exclude themselves from the right to work them during the currency of the lease; the plaintiffs come into possession; the term—namely, seven years—is determined; and the rent, which here takes the shape of royalty, fixed—upon the basis of which the plaintiffs are expressly authorised to raise and make sale of the coal. It was furthermore established by the evidence that at the date of the agreement the mine was open and being worked.

I hold therefore that the instrument is in legal effect a demise of a mine, though not under seal yet valid according to the law of this colony—or, in other words, a grant of the coal for seven years, with a license co-extensive with the grant and incident thereto, to work the seams and dispose of the coal during the term irrevocable by the defendants. This being so, the eviction of the plaintiffs by the defendants was wrongful, and the plaintiffs are entitled to the damages awarded by the jury therefor. The remaining question to be decided is that of jurisdiction. I am of opinion that no question of title arises, or could arise. The plaintiffs and defendants were lessors and lessees respectively; each party was estopped from denying the position of the other. If the defendants had a right to revoke, their entry was lawful; if not, they were trespassers.

Judgment will therefore be entered for the plaintiffs for the several amounts found by the jury, making in the aggregate £192 19s. 9d.

On the issues raised by the defendants' cross action there will also be judgment for the plaintiffs, the jury having found against the defendants on all of them.

The plaintiffs will have their costs, and as this was a case of some importance, and occupied the whole day, I increase the fee of the plaintiff's counsel to £10 10s. and I certify for five witnesses.

Solicitor for plaintiffs, *O'Sullivan*, Ipswich.

Solicitors for defendants, *Foxton & Cardew*, Ipswich.

May 17th, 1882.

HILL *v.* COX.

Real Propevty Act of 1861, section 52; and the Real Property Act of 1877, sections 18 and 31.

H. leased land under the *Real Property Acts of 1861* and *1877* to C, for upwards of three years by means of a lease not in form E of the schedule to the Act of 1861.

Held, that such lease was void under section 52 of the Act of 1861, but that C having entered and paid rent under the void lease he became a tenant from year to year and that such tenancy was a demise within the meaning of section 31 of the Act of 1877.

O'Shea v. Peters, commented upon,

THIS action, involving an important question under the Real Property Act, was tried at the last Civil Sittings of the District Court at Brisbane, before Mr. Deputy Judge Chubb, on the 4th May, when judgment was reserved.

The facts sufficiently appear from the judgment delivered to-day.

In this action, which was tried before me at Brisbane on the 4th instant, the plaintiff sought to recover from the defendant £132 17s. 3d. for rent and damages for non-repair of buildings let to the defendant and for non-payment of Divisional Board rates due upon the property. The defence set up was—

1. That the property was demised property under the provisions of the Real Property Acts; that the defendant had paid rent up to the 20th November, 1880, and had performed the covenants as to payment of rent, repair, &c., up to the 15th May, 1880, on which date the buildings were destroyed by fire without any default on the part of the defendant; that the plaintiff had not reinstated the buildings, and that the defendant was by section 31 of the Act of 1877, consequently relieved from the payment of rent and performance of covenants to repair.

2. That the premises were used in a tenantlike and proper manner.

Having considered the evidence, I find the facts to be as follow:—

1. An instrument in writing, which amounts to a lease, was made and signed by the plaintiff and defendant on the 20th August, 1876, by which the plaintiff let to the defendant the premises therein described for the term of five years from that date at a rental of £30 a year, payable quarterly in advance; and the defendant thereby agreed to keep the fences and buildings in good and proper repair, and to pay any taxes levied on the land by the government or any municipal body.

2. The premises demised are under the provisions of the Real Property Acts.

3. The lease is not in form E of the schedule to the Real Property Act of 1861, as required by section 52 of that Act.

4. The defendant entered into possession under the lease, and occupied up to September, 1880, and paid rent up to the 20th November, 1880.

5. The amount of rent unpaid is £22 10s.

6. The buildings were destroyed by fire on the 15th May, 1880, without any default on the part of the defendant.

7. The value of the buildings so destroyed is £30.

8. At the expiration of the lease there were no buildings on the land, and the fences were not in good repair.

9. The cost of repairing the fences is £10.

10. The defendant did not use the premises in an untenantlike and improper manner.

11. The rates due on the property are £2 6s. 8d., and have been demanded by the Divisional Board, but not paid by the plaintiff.

The first question to be determined is—"What is the nature of the contract in this case?"

It was contended by Mr. Rutledge for the plaintiff that not being in form E, and being for a term exceeding three years, it was absolutely void as a lease, but that the defendant having entered into possession under it, he became a tenant from year to year upon the terms of the void lease so far as they were applicable to a yearly tenancy. That, as this tenancy was created by operation of law by the entry and payment of rent, and not by the contract of the parties, it was not a demise, and the property was not demised under the Act within the meaning of section 31

of the Act of 1877; consequently the defendant was not relieved by that section, but, on the contrary, was bound by implied covenants to rebuild the premises and to pay the rent also. Mr. Rutledge cited a case *O'Shea v. Peters*, decided in this court in December, 1880, by Judge Paul (which I will refer to presently) in support of his contention. It was not disputed by the defendant's counsel, Mr. Lilley, that the instrument was a void lease, but he argued it was only void "at law," and that it operated as an agreement for a lease, which equity would enforce by a decree for specific performance, and that as the rules of law declared by the Judicature Act were in force in this court, I could treat the instrument as if it had been actually reformed by a Court of Equity into a lease conformable with section 52 of the Real Property Act of 1861 and form E of the schedule, in which case, of course, the defendant would necessarily be relieved by section 31 of the Act of 1877. In addition, he contended that if the defendant were a tenant from year to year, the implied covenants to pay rent and taxes and keep in repair were in like manner suspended by section 31, until the landlord had reinstated the buildings destroyed by the fire.

Now, whether leases of land under the Acts for terms exceeding three years are absolutely null and void, if they are not in the prescribed form, or whether they possess any legal value, and if any, what, is a question the determination of which depends on the scope and object of the enactment itself. No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an applied nullification for disobedience. Maxwell on Statutes, 331. Section 52 of the principal Act, enacts that when land is intended to be leased for any term exceeding three years "the proprietor shall execute a lease in form E of the schedule." It is to be observed that the section contains no negative words declaring the consequences of non-compliance with the mandate. In *Liverpool Borough Bank v. Turner, 30 L.J., N.S., Ch. 379*, it was held that the formalities prescribed by the Merchant Shipping Act of 1854 for the transfer of ships were imperative, although there were no negative words as in earlier and repealed Act *in pari materiâ*, declaring all transfers in any other form null and void. Section 18 of the Act of 1877 provides for leases for less than three years, and allows them to be in any form. This would seem to imply that the intention of the Legislature was to leave section 52 of the principal Act imperative. For these reasons I think the lease is void. No doubt it is a good agreement for a lease, which might have been enforced in Equity if the parties had moved in time. But the term is expired, and I do not see how I can presume a possible decree of the Supreme Court and treat it as a lease in form E. Being void, therefore, the plaintiff could not maintain his action upon it for rent and breaches of covenant; therefore I allowed him at the trial to amend his claim to one upon a tenancy from year to year.

The defendant then having been let into possession of the premises under the void lease, he impliedly became a tenant at will, and by payment of rent his tenancy at will was changed into a tenancy from year to year upon the terms of the void lease, so far as they were applicable to and not inconsistent with a yearly tenancy. And the stipulations in the void lease to pay rent and keep in repair are applicable to and became implied covenants of the implied yearly tenancy, and the covenant to repair includes the rebuilding of premises destroyed by fire where not expressly excepted. But I cannot agree with the argument for the plaintiff, that this implied tenancy is outside and independent of the Real Property Acts. The provisions of these Acts apply to all dealings with land which is under the Act. Parties cannot contract so as to exclude them; to do so would be to contravene the statutes. They may, however (section 76), expressly negative or modify the covenants and powers to be implied under the principal Act, but that is all. The tenancy existing between the parties is therefore under the Acts. Section 11 of the Act of 1877, expressly

recognises tenancies from year to year. A tenant from year to year is one who holds under a demise, express or implied, for a term determinable by notice to quit at the end of the first or any subsequent year, and a tenancy from year to year is a term. *How v. Kennett, 3 A. & E., 662.* The defendant, therefore, in my opinion, held the property in question under an implied demise for a yearly tenancy, and the property being under the Act it is, therefore, "demised property" within the meaning of section 31; consequently the implied covenants to pay rent and taxes, and to keep and yield up in repair are suspended, and the defendant is relieved by the statute from all liability under those covenants to the plaintiff after the 15th May, 1880.

There is a further reason why the plaintiff could not recover the rates, and that is a Divisional Board is not a "Municipal body" (see section 80 of the *Divisional Boards Act*). They are not within the contract.

O'Shea v. Peters, cited by defendant's counsel in support of his contention that there was no demise under the Act, is, to my mind, not in point here, but, as it was so strongly pressed and relied on, I will state my view of it. In that case the premises were under the Act, and held under a tenancy for two years created by a written agreement, and destroyed by fire during the tenancy. His Honor Judge Paul held as follows:—"The defendant cannot derive any benefit by his agreement under section 31 of the amended Act, inasmuch as the buildings let were not demised under the provisions for leases under the Real Property Act. Section 31 only refers to buildings demised under the provisions, &c., and only suspends covenants which are implied under the 70th section of the principal Act. The agreement under which the defendant held the premises could not have been registered as a lease, not because the term was only for two years, but because it was not in the form required by the principal Act." As I understand this judgment, it means that because the agreement was not a lease in form E, and could not therefore be registered, it did not amount to a lease under the Act, and was, as regards the Act, invalid and simply a contract outside it. I have already expressed the opinion that all contracts dealing with land under the Acts must be governed by those Acts. And as I read section 18 of the Act of 1877, leases for less than three years may be in any form, either parol or written, and are expressly declared to be valid. Section 11 of the above Act says that the estate of a registered proprietor shall not be paramount or have priority over any tenancy from year to year or for any term exceeding three years. These sections, compared with section 52 of the principal Act, clearly show that it is only leases for more than three years that are required to be in special form. Therefore, it seems to me, that the agreement in *O'Shea v. Peters*, fully satisfied section 18, and was a valid lease for two years, and that the implied covenants were consequently suspended by section 31. It is hardly necessary to point out that the beneficial provisions of sections 31 are not confined to leases under section 52; they cover every demise of property under the Act.

There will therefore be judgment for the defendant with costs. Certify for four witnesses.

Solicitors for plaintiff, *Wilson & Wilson.*

Solicitor for defendant, *Thynne.*

LILLEY, C.J. May 15th, 1882.

IN INSOLVENCY.

Ex parte DUNN. *In re* DUNN.

Where a person comes into court asking for the relief which the law gives him under the Insolvency Act of 1874, he must satisfy the mind of the court by something like proof in the shape of contemporary record that what he is stating is the truth and that he is entitled to the relief afforded by the Act.

THIS was an application for a certiffcate of discharge under section 167 of the *Insolvency Act of 1874.* The facts of the case appear sufficiently from the judgment:—

LILLEY, C.J.:—In this matter I have read over the affidavits and considered the whole case. It seems that the insolvent was a bank clerk receiving for some years a salary of £250 per annum,

which was afterwards raised to £275, he therefore knew the exact extent of his means. He applies to me for a certificate on the ground that his insolvency has arisen from circumstances for which he can not justly be held responsible. I think the court should follow the homely old rule, that a man must live within his means. In this case, they cannot be said to be inadequate. If they did not enable him to live in luxury, or in accordance with some preconceived idea of style, his salary was sufficient for ordinary comfort, and if employers pay their clerks salaries very little above those paid to artisans, they must expect their clerks to appear but simply clad, and to live in houses suited to their means, and to conform their habits somewhat to men in the same rank of life. Employers cannot expect their servants to appear as gentlemen and maintain the rank and habits of gentlemen if they pay them salaries little above those paid to working men. I do not say that they do expect it; if they do, I think it is a very great hardship indeed upon those who have been brought up in that class of life. The insolvent has endeavored to induce me to grant his certificate upon two grounds. First, he says that in removing him from one place to another in their service, the bankers paid him an inadequate amount for his expenses. That would not justify him in getting into debt and throwing the burden, which should fall upon his employers, upon the shoulders of other people. Again, he says that he had a sickly wife, and that it was necessary to remove her to a southern colony. The same answer may be given to that. When a man undertakes the wedded state upon a certain salary he must forecasts events, and if hard times come or hardship comes in the shape of sickness, he is not justified in levying, so to speak, a forced benevolence upon others in the shape of debt: he must cut his coat according to his cloth. If expenses ran high in one direction and they were unavoidable, he should have reduced them in another. It does not appear that he made any retrenchment in his ordinary style of living. Under all the circumstances I cannot say that he has satisfied me, as it is his duty to do, that his insolvency has arisen from circumstances for which he cannot justly be held responsible. On the contrary, I think, he has shown a want of foresight and prudence. It is notable too that he has kept no record of his expenditure, and the Court has no means of checking his statements, although I am disposed to believe that they are true. Every insolvent, in whatever walk of life, is bound to keep a record of his expenditure, so that his creditors may see precisely how his money has been spent. It does not matter whether a man is in trade or not, if he comes here for the relief the law gives him under the Insolvency Act, he must satisfy the mind of the Court by something like proof in the shape of contemporary record that what he is stating is the truth, and that he is entitled to the relief afforded by the Act. Under these circumstances, I cannot grant the application, but I will treat the case as one of first impression, and allow my opinion to go forth to the public, that I will refuse a certificate altogether to any person getting into debt under similar circumstances. I think it will be sufficient punishment in this instance if I suspend his certificate for twelve calendar months—and I suspend it for that period accordingly.

Solicitors for insolvent, *Hart, Mein & Flower.*

FULL COURT.

June 6th, 1882.

Ex parte CRAMB.

Towns Police Act of 1838, (2 Vic., No. 2) — Offence committed within town boundary — Appeal from order granting rule *nisi.*

MOTION by way of appeal from PRING, J.

The presiding magistrate on a charge against Cramb for furious riding, brought under the *Towns Police Act of 1838, (2 Vic., No. 2),* took judicial notice of the fact that that Act applied to the town of Ipswich, and a conviction was made

thereon. On the 31st May, a rule *nisi* for a prohibition against the presiding magistrate, and one McBride, the prosecutng constable, was granted by Pring, J., in Chambers, on the ground that it should have been proved that the Act applied to the town of Ipswich. His Honor declined to grant the rule upon the additional ground,—that the place where the offence was committed, ought also to have been proved to be within the town boundary, marked out in accordance with s. 43 of the Act, and that there was no such evidence.

Griffith, Q.C., now moved by way of appeal, that the rule *nisi* might be granted upon the second ground also. He contended that assuming for the purposes of this motion that the magistrate could take judicial notice of the fact that the Act applied to the town of Ipswich, it should also have been proved that the offence was committed within the boundary marked out in accordance with s. 43 of the Act, and there was no evidence to that effect. He cited *Browne v. Thompson, 2 Q.B., 789.*

The Court held that Pring, J., was right in refusing the rule upon the second ground. That there was at any rate sufficient evidence to throw the burden of proof upon the defendant; and refused the rule.

Solicitors for Cramb, *Appel & Gill*, Brisbane & Ipswich.

CRAMB *v.* BRADY, AND ANOTHER.

Towns Police Act of 1836, (2 Vic., No. 2)—Magistrate can take judicial notice of the fact that a proclamation has been made by Governor in Council, if once proved in his court.

Motion for rule absolute. The facts are stated in *Ex parte* Cramb, *ante.*

Griffith, Q.C., moved the rule absolute.

Noel showed cause on behalf of the magistrate (Brady) and the arresting constable, and contended that a court would take judicial notice of a Royal Proclamation, and therefore a court could take judicial notice of a proclamation under s. 64 of the Act in question. He also contended that if the magistrate's memory was not at fault, it was not necessary to produce the *Gazette* containing the proclamation. He cited *Taylor on Evidence, s. 5, page 5.*

He was stopped by the court.

Griffith, Q.C., contended that the extent of the jurisdiction conferred on magistrates under the proclamation was a limited one, and that it ought to have been shown that the place where the offence was committed was within that limited jurisdiction.—He cited *Van Omeron v. Dowick and Others, 2 Camp. 41, per Lord Ellenborough, at p. 44; and Browne v. Thompson, 2 Q.B., 789.*

The Court discharged the rule, their Honors holding that the proclamation was a matter that could be taken to be within the magistrate's memory, and of which he could consequently take judicial notice. If the defendant considered the magistrate's memory at fault, the onus was upon him to show that he was wrong. The proclamation was a matter of law, the magistrate knew that the *Towns Police Act* was in force within the town of Ipswich, and there was evidence that the offence was committed within the town boundary.

Solicitors for Cramb, *Appel & Gill*, Brisbane and Ipswich.

Solicitor for Magistrate, &c., *Crown Solicitor.*

July 11th, 1882.

DOWLING *v.* FRITZ AND OTHERS.

Malicious Injuries to property—29 Vic., No. 5, sec. 43.

A Snake does not come within the meaning of the 43rd section of 29 Vic., No. 5.

This was a motion to make absolute a rule *nisi*, granted at the instance of Patrick Dowling, of Dalby, for a writ of prohibition against C. R. Haly, P.M. of that place, James Skelton, J.P., and John Fritz, complainant in the court below, in respect of a conviction whereby Dowling was fined £10 for "maliciously wounding a Tasmanian diamond snake" belonging to Fritz.

It appeared that Fritz, who was a showman, being about to open a show on the Dalby race-course, was putting his paraphernalia over the fence, when some dispute occurred between him and Dowling, who had purchased the gate privileges, and the latter threw a box containing a snake over the fence, injuring the animal so much that it was expected to "pine away and die." Fritz stated that he had paid Mr. Jessop for the right to exhibit his show on the course, but not being allowed to take a dray inside he was compelled to put his boxes over the fence. Dowling, however, maintained that, as purchaser of the gate, he was justified in the action he took, and said he did not throw the snake over, but put it quietly through the fence. The information was laid under the 43rd section of the *Injuries to Property Act (29 Vic., No. 5)*, which provides for punishing those who "shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of a larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose." The rule *nisi* was granted on the grounds:—

(1) That a snake was not a subject of larceny at common law, and not an animal ordinarily kept in confinement; and (2) that the injury, if any, was done in the exercise of a *bonâ fide* right, the snake being at the time a trespasser.

Griffith, Q.C., moved the rule absolute.

Garrick, Q.C., showed cause, and cited in support of his argument, *Coke's Reports, 487; Rex v. Seering, R. & Ry., Cr. Ca., 350; Wilkinson's Queensland Magistrate, 392; Oke's Synopsis.*

Lilley, C.J., referred to an article in the *Law Journal, April 15th, p. 196*, in which two English decisions, the one relating to a lion, and the other to a mouse, are commented upon.

Garrick, Q.C., was stopped by the Court, who said the matter would be decided on the first point.

Griffith, Q.C., was not called upon.

Lilley, C.J.: The Court has no doubt about the matter on the first point. A snake was not covered by the description "ordinarily kept in a state of confinement." The description was genuine, and referred to animals which were allowed to go in and out of their places of confinement—that was, animals that were confined as a rule but not always. Snakes, as a class, were certainly not kept in confinement. The rule would therefore be made absolute on the first point.

Power argued for Fritz, that costs should not be granted against him as the ground was a novel one.

The Court refused the application, and the rule was made absolute with costs against Fritz.

Solicitor for Dowling, *Thos. Bunton.*

Solicitors for Haly, P.M., *Foxton & Cardew.*

Solicitor for Fritz, *A. W. Chambers.*

In re A. M. DRYSDALE, AN ARTICLED CLERK.

Service under Articles—Supervision & Control.

The facts of this case as disclosed by the affidavits are briefly as follows:—In March, 1877, Drysdale was articled to John Henry Flower, solicitor, of Brisbane. The climate of Brisbane not agreeing with Drysdale's health, he was advised by medical men to go and reside on the Downs; and in November, 1880, acting on this advice, he managed to get his articles transferred to P. L. Cardew, who was practising at Dalby. A short time after such transfer, Mr. Cardew, went to reside in Ipswich, and left Drysdale at Dalby to manage the business at a fixed salary. Mr. Cardew frequently visited Dalby to supervise and inspect the working of the office; and Drysdale paid frequent visits to Ipswich to report on its working. When Mr. Cardew could not go to Dalby, he instructed Drysdale by letter every week. When Drysdale applied to the Board of Examiners to be examined they refused the application, on the ground that they were not satisfied that under the circumstances submitted to them his service was sufficient.

Griffith, Q.C., and Murray-Prior, moved for an order directing the Board to examine Drysdale. *Griffith, Q.C.*, cited *Ex parte Matthews, 1 B &*

Ad., 160; Ex parte Cross, 2 Dowl. N.S., 692; Ex parte Hodge, 2 Jur., 989; In re Duncan, 5 B. & S., 341; In re Porter, Supreme Court, Brisbane, 1875.

Noel opposed the motion on behalf of the Board.

The Court intimated that there was not sufficient proof of Drysdale's illness before it; and the motion was withdrawn.

Solicitors for Drysdale, *Foxton & Cardew.*

DARVALL *v.* LOVE.

Licensed Auctioneer—Sale of Spirits in quantities of two gallons or upwards—Licensed Distillers Act (13 Vict., No. 36)—Registration of Spirit Merchants Act, (20 Vict., No. 37).

It is not lawful for a licensed auctioneer to sell at his place of business, either privately or by public auction, spirits in quantities of 2 gallons or upwards either on his own or any other person's behalf, unless he has registered his name and a particular description of his premises under Sec. 14 of 13 Vict., No. 36, and unless he has paid an annual fee as required by 20 Vict., No. 37.

This was a special case stated for the opinion of the Court. The case stated, set out that on the 20th June, 1882, the plaintiff, who is Chief Inspector of Distilleries, purchased at the auction mart of the defendant, a licensed auctioneer, one case of whisky, containing 2 gallons and upwards, which had been put up by the defendant in the ordinary course of his business. The defendant had not registered his name and a particular description of his premises, and had not paid an annual license fee as required by the above-named enactments. The question submitted for the opinion of the Court was: "Whether an auctioneer has a right under the laws of the colony to sell spirits in quantities of two gallons and upwards upon his own premises without having registered his name and a particular description of his premises, and having paid an annual fee."

Cooper, A.G., and *Noel*, appeared for the plaintiff; and *Power*, for the defendant.

Cooper, A.G., submitted that the question would depend upon the construction to be put upon (1) The Licensed Auctioneers Act, (25 Vict., No. 7,) sec. 2. (2) The Licensed Distillers Act, (13 Vict., No. 36,) sec. 14. (3) The Registration of Spirit Merchants Act, (20 Vict., No. 37,) and he argued, that under the above-named Acts, an auctioneer was not entitled to sell spirits in quantities of two gallons or upwards without performing the conditions above mentioned.

Power, for the defendant, contended that an auctioneer could not sell privately, but that he could sell at public auction, for in that case he did not sell for himself, but as agents for others, and therefore he should not be compelled to pay a wholesale spirit merchant's license.

Lilley, C.J., read the question submitted for the consideration of the Court, and said his answer to that was—No. The language of the Licensed Distillers Act seemed to be perfectly plain, and included all persons selling spirits in quantities of two gallons and upwards.

Harding, J., said the Auctioneers Act, section 2, authorised duly qualified persons to exercise the business of an auctioneer—to sell any estate, goods, or effects; but it did not authorise him to commit an illegal act. He could only exercise the business so long as he was acting legally. The Licensed Distillers Act, section 14, provided —"That is shall not be lawful for any person to sell spirits" unless he registered his name and premises. If he did not do this it would be unlawful for any person to sell spirits, and the Auctioneers Act could not authorise him to do it; but as soon as he registered he could sell spirits in quantities of two gallons and upwards. He thought therefore that the answer to the question was, that it was necessary to register.

Pring, J., concurred.

Solicitor for plaintiff, *Crown Solicitor.*

Solicitor for defendant, *Edwards.*

August 1st, 1882.

In re A. W. DRYSDALE, AN ARTICLED CLERK.

Service under Articles—Suspension and Control.

THE facts of the case are reported *ante*, 83.

Griffith, Q.C., (Prior with him) renewed the application made at the last sittings of the court for an order directing the Board of Examiners for Solicitors, to examine *Drysdale.* Further affidavits had been filed showing that *Drysdale* had been compelled in consequence of his health to reside at Dalby after Mr. Cardew left that town, and submitted that unless the board strongly opposed the application, the court would be satisfied with the service.

Noel, on behalf of the members of the board, stated that as the matter had been previously before the court, they did not feel justified in dealing with it upon the additional evidence.

The CHIEF JUSTICE said the court would like to know how the business at Dalby had been carried on. It appeared to have been carried on for the benefit of the clerk, and that the solicitor to whom he was articled permitted an unqualified person to practise in his name.

Griffith, Q.C., stated that the solicitor himself had given evidence on that point.

The Chief Justice said the court did not feel satisfied. The transaction appeared *primâ facie*, very like a carrying on of the business for the benefit of the clerk, and he did not think it was a matter to be encouraged, that solicitors should send out unqualified persons to practise in their names in country towns. The application would be refused, but leave to complete the remainder of the time under fresh articles would be given.

Solicitors for Drysdale, *Foxton & Cardew.*

September 5th, 1882.

O'KANE *v.* SELLHEIM AND OTHERS.

34 Edward III., cap. 1, 11 Vic., No. 13.

The jurisdiction given to Justices under *34 Edward III.*, in respect to defamatory libel, is now in abeyance by reason of the provisions of 11 Vic., No. 13, (*The Defamation Act*).

***Held*, however, that upon a conviction for defamatory libel, when the defendant has had an opportunity of using his statutory privilege, the judge may require sureties for good behaviour.**

In an information laid under *34 Edward III., cap. 1*, the words complained of should be set out; and upon an objection being taken to the information on the above ground, the magistrates should make a distinct charge which they should require the defendant to answer.

Unless some serious breach of the peace be threatened or likely to arise, sureties for *good behaviour* as distinguished from sureties to *keep the peace* should be seldom or never required by justices.

***Haylock* v. *Spark* commented upon.**

THIS was a motion to make absolute a rule *nisi* for a writ of prohibition against Philip Sellheim, and other justices, and William Pritchard Morgan, all of Charters Towers, prohibiting them from proceeding on an order made by the said justices on the 12th day of May, 1882, by which the appellant, Thadeus O'Kane, editor and proprietor of the *Northern Miner* newspaper, was bound over, himself in £100, with two sureties of £50 each, to be of good behaviour towards Morgan and other liege subjects of her Majesty, for a period of twelve months; in default to be imprisoned for twelve months.

Griffith, Q.C., apeared to move the rule absolute; *Cooper, A.G.*, and *Miller*, to show cause.

The information under which the magistrates acted was laid under 34 Edward III., cap. 1, which provides that:—

In every county shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to restrain offenders, rioters, and all other barraters, and to pursue, arrest, take, and chastise them according to their trespasses and offences, and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform and inquire of all those who have been pillors and robbers in the parts beyond the sea, and be now come again and go wandering, and will not labour as they were wont in times past, and to take and to arrest all those that they find by indictment or by suspicions, and to put them in prison; and to take of all of them that be not of good fame where they shall be found sufficient as surety and mainprize of their good behaviour towards the king and his people, and the other duly to punish, to the intent that the people be not by such rioters and rebels troubled nor endangered,

nor the peace blemished, nor merchants nor others passing by the highways of the realm disturbed, nor put in the peril which may happen of such offences.

The information charged the defendant that he "did on the 9th day of May, 1882, at Charters Towers, and on other and divers occasions make use of, and has for a long time continued a course of conduct of unmannerly and quarrelsome words towards one William Pritchard Morgan, of Charters Towers, tending directly to a breach of the peace." The rule *nisi* was granted at the last sittings of the court, on the following grounds:—(1) That the information did not disclose that the defendant was "not of good fame" within the meaning of the statute 34 Edward III.; (2) that the evidence did not support the motion; (3) that the evidence did not disclose any facts authorising the justices to order the defendant to find sureties for his good behaviour; and (4) that the order does not show any such authority.

Griffith, Q.C., now moved the rule absolute.

Cooper, A.G., cited *Haylock v. Sparke, 1 E. & B., 471;* on the authority of which case he submitted that proof of a persistent writing of defamatory words was sufficient to give the justices jurisdiction under the Act, and that a greater aggregate of vile slanders against an individual than those which gave rise to this action could not be got together; the malice, he submitted, was perfectly evident, since there was evidence of nineteen distinct defamatory articles, and some of the publications contained a dozen different libels. He further contended that the offence complained of need not necessarily consist of spoken words, but that a continued course of writing was sufficient. As to the objection to the information he contended that no information was necessary in such a case, but that a person might make a complaint and he quoted from *Haylock v. Sparke, supra, p. 487.* In conclusion he submitted that there was sufficient evidence to support the information, that the justices had jurisdiction and that there was a proper exercise of such jurisdiction.

Griffith, Q.C., in reply, submitted that *Haylock v. Sparke* was the only modern case on the subject and that that case was an authority that the justice did not exceed his jurisdiction although he showed a want of discretion in exercising his powers for such defamation as was shown in the case; but it was not an authority for the proposition that the jurisdiction to require sureties might be exercised by justices in the case of defamatory libels; that there was a great difference between scrawling about the streets and the publication of matter in a newspaper. He submitted that the court would find on examination that the authorities could all be traced back to a case in the Star Chamber, and he referred to the following authorities—*Hawkins' Pleas of the Crown, Bk. 1, ch. 28, sections 3 & 4; vol. 1, p. 485; Comyn's Digest, Forcible Entry, D. 25; Burn's Justices, vol. 5, 763*—as to libellers, and he contended that the justices had no jurisdiction in such a matter as that complained of in this case.

LILLEY, C.J., requested counsel to argue the point whether there was anything in our Defamation Act with which the jurisdiction exercised by the justices in this case was inconsistent.

Griffith, Q.C., contended at length that the two tribunals could not stand together, and that the jurisdiction given to justices by the old Act of Edward III. was inconsistent with the statutory law of the colony.

Cooper, A.G., submitted that our Defamation Act did not take away the right to proceed against the defendant for a public offence under the statute of Edward III. He referred to the 5th & 6th sections of the Vagrancy Act.

LILLEY, C.J.:—The applicant, O'Kane, was the printer and publisher of the *Northern Miner* newspaper on the 12th May last, when he was brought before certain justices of the peace on an information by the respondent, Morgan, that he, O'Kane, "did make use of, and had for a long time continued a course of conduct of unmannerly and quarrelsome words tending directly to a breach of the peace." The justices upon this complaint ordered him to be of good behaviour for twelve months, and for that purpose to enter into a recognizance for that period, himself in

the sum of £100, and to find two sureties of £50 each, and in default to be imprisoned until he complied with the order; such imprisonment not to exceed twelve months. The justices assumed to exercise jurisdiction under the statute 34 Edward III., cap 1, which empowers justices to bind over to the good behaviour towards the sovereign and his people all them that be not of good fame, wherever they be found, to the intent that the people be not troubled or endangered, nor the peace diminished, &c., &c. At the June sitting of this court a rule *nisi* for a prohibition against the respondent and the justices proceeding on the order in the court below was granted on several grounds, the most important being the first and third, which are these:—1st, that the information does not disclose that the defendant was not of good fame within the statute; and 3rd, that the evidence does not disclose any facts authorising the justices to order the defendant to find sureties for good behaviour. The statute of Edward does not require any information or complaint in writing, and a justice may, on view of any misconduct within that Act, require sureties for good behaviour. The information was, however, in writing, and is clearly bad *(Bradlaugh v. The Queen, 3 Q.B.D., 607).* The words complained of should have been set out. As it is, the information discloses no offence or misconduct amenable to the law. On this objection being urged, as it was, before the magistrates, they should have made a distinct charge, and required the defendant to answer it. This they could have done *instanter*, but they proceeded to hear the case upon an information which gave the defendant no knowledge of the offence or misconduct imputed to him. He had thus no opportunity to shape his defence, or to sift the evidence of the witnesses against him. A complaint or charge is the foundation of every summary proceeding before justices, whether it be required by statute or not. If required by the statute creating the offence complained of to be in any particular form or in writing, or on oath, &c., the procedure required by the Act must be followed. Then the result of the authorities is this:—If the defendant appears before the justices and the information is defective in substance or form, he may nevertheless be then and there properly charged, and the case may be heard unless an adjournment be granted by reason of such defect or irregularity. The defendant may, nevertheless, waive it either expressly or by conduct, as by allowing the hearing to proceed without objection, by cross-examining witnesses or calling evidence for his defence, &c. *(The Queen v. Hughes, 4 Q.B.D., 614; Blake v. Beech, 1 Ex D., 320.)* In effect the original information or complaint ceases to be practically material when "it has performed its twofold effect of informing the defendant of the nature of the complaint against him and procuring or enforcing his appearance." *(Reg. v. Paget, 8 Q.B.D., per Field, J., 155).* The information or charge may be made in the presence of the accused, and he may be then and there called upon to answer it; but it must be of an offence or misconduct known to the law. Now, in this case, the justices upheld the insufficient information and proceeded to hear and adjudicate on the case. The defendant not only insisted on his objection to the information, but urged that there was no charge. Mr. Marsland, his attorney, said, "I have nothing to answer." No charge was thereafter made against the defendant, he asked no questions, called no witnesses, made no defence, and did nothing to waive his right to a regular hearing, or to object to the irregularity of the proceeding in the court below. It is a principle of natural justice, as well as of law, that a man must know of what he is accused before he can be called upon to answer it. There was a failure to observe this elementary rule in this instance, and the applicant's objection must prevail. This would be sufficient to dispose of the case at this time, and to entitle the applicant O'Kane to our judgment.

But the third ground of the rule covers, although it does not pointedly state, another and important question—that is, whether the justices had jurisdiction to require sureties for good

behaviour in this instance under the statute of Edward III. The complaint before them was, as the evidence shows, founded on a persistent course of alleged libels upon Morgan and others published by the defendant in the *Northern Miner*. It has been urged upon us that the statute is old and not adapted to the circumstances of our modern society. Our laws do not die of old age, but speak on from day to day, and cease only to be potent when the offences which they condemn no longer exist. When society reforms itself, a law may cease to be applicable to its then conditions, but it remains in the armoury of judicial weapons available for use should the need of it again arise. It is true that many of the instances of misconduct which were formerly visited under the statute of Edward III., being merely breaches of morals or good manners, or regulated now by other legislation, are no longer dealt with under that ancient statute, and it may be laid down for the guidance of magistrates that unless some serious breach of the peace be threatened or likely to arise, sureties for *good behaviour* as distinguished from sureties *to keep the peace*, should be seldom or never required. But the mere antiquity of the law can never be accepted as proof of its having ceased to exist. If this were so, all our ancient chartered liberties might be judicially repealed. We treat this argument more fully than it merits from intrinsic value, because even juries are now invited at times to disregard the law because it is old, or has never been put in force, a line of defence which judges invariably reprove, and the inherent immorality of which cannot be too strongly condemned as a solicitation to judicial perjury on the part of jurors. Nor can we yield, in this instance at least, to the argument that the statute would be inapplicable to the social conditions of our day. So lately as 1853, in the case of *Haylock v. Sparke, 1 E. & B., 471*, the court of Queen's Bench, composed of Lord Campbell, C.J., and Justices Wightman, Erle, and Coleridge, after a review of the authorities, gave this judgment:—"Upon the whole it appears to us that a justice of the peace has jurisdiction to require sureties for good behaviour in some cases of libel against private individuals, adding, "there was in our opinion a great want of discretion in requiring sureties on such an occasion." There is nothing in the state of society which in our time would render this mode of repressing libels obsolete. It will be observed, however, how cautiously the judgment in that case is limited to "some cases of libel." But a more important question was suggested from the bench during the argument of the present case before us, namely—Is the exercise of this jurisdiction under the statute of Edward consistent with certain new rights and privileges given to defendants by our modern legislation on the subject of defamatory libel? Down to the year 1843, when Lord Campbell's Act was passed "for the better protection of private character, and for more effectually securing the liberty of the Press, and for preventing abuses in exercising the said liberty," the truth of the libel was no defence in any proceeding in the criminal jurisdiction, where it was indeed held, "the greater the truth the greater the libel," whether before justices or in the superior courts. By the last-mentioned Act (6 & 7 Vic. cap. 96) section 6, the defendant acquired the new right, under the conditions imposed by the statute, to plead in a criminal case the truth of the matters charged, and that it was for the public benefit that the said matters should be published. We copied that legislation by section 10 of our Act (11 Vic. No. 13) intituled "An Act to amend the law respecting defamatory words and libel." The purposes in view were the same as those contemplated by Lord Campbell's Act. Defamatory libels are criminal because of their tendency to provoke breaches of the peace. If the libel be true, and the publication of it be beneficial to the public, it ceases to be an object of animadversion to the criminal or civil law of this colony (sections 4 and 10 of 11 Vic. No. 13). Whether the proceeding be civil or criminal then, there is a clear right given to the defendant to plead and prove the truth of the libel and its public

advantage. When once the defendant has established this position his immunity is complete; he is not required to suffer any public punishment or restraint, or to compensate any private injury. But justices of the peace have no jurisdiction to inquire into the truth or falsehood of the alleged libel *(Reg. v. Townsend, 4 F. & F., 1089; Reg. v. Sir Robert Carden, 5 Q.B.D., 1).* It follows that if proceedings be taken in any court in which the privilege cannot be asserted, that tribunal has no jurisdiction over the matter. The privilege goes to the root of the charge; it is as general as the law and cannot be taken away from the defendant by any choice of jurisdiction by the prosecutor. We think the words in our Act, giving the privilege "on the trial of any indictment, or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matter charged may be inquired into," must not be too narrowly or technically construed to limit, or deprive the defendant of, the new right. Whether the proceeding is by information *ex officio* before the Supreme Court, or written or oral before a justice of the peace, or whether the justice inform himself by his own view, the right to plead the truth, either in writing or orally, or to claim the benefit of this defence, seems to us to be indefeasible, except by the defendant himself. Any omission on the part of the defendant to assert it in the court below would be immaterial, as the justices have no jurisdiction to try the question upon which it depends. Indeed we are required to observe for ourselves any defect or excess of jurisdiction, and to keep inferior courts within their powers *(Reg. v. Barton, Sup. Ct., Q. L. J. Reports, Supp. 16, 8th Aug., 1879).* In the case of *Haylock v. Sparke* no point was made as to the effect of Lord Campbel's Act on the jurisdiction of justices under the statute of Edward in cases of defamatory libel, and the learned judge whose name is associated with the Act, and who delivered the judgment of the court, did not at any time advert to it. The case is one which may possibly stand upon its own facts. We certainly do not think the case an authority in this colony under the circumstances disclosed in the present matter, and we think it is a decision likely to be very strictly limited by the English courts, not only to "some," but to few, if, indeed, it be hereafter applied to any, cases of defamatory libel. It might have been well if the judges had shown what limitation they conceived the law had placed upon the jurisdiction of justices of the peace in cases of defamatory libel under the statute of Edward. Did the jurisdiction depend in their opinion upon the greater or less malignancy or frequency of the libel, or its more or less potent tendency to provoke a breach of the peace, to disturb the good order and peace of society? But the answer to this suggestion is that all libels are restrained because of their tendency to incite to breaches of the peace; this is the reason of their being treated penally, or criminally, and the gravamen of the misconduct for which sureties are required. We do not think that Fox's Act, which preceded Lord Campbell's, made any change or limitation of the justices' jurisdiction. Thev had to decide the question of libel or no libel before that statute was passed, and the only effect of the Act is to provide that upon the trial of an indictment or information for making or publishing any libel the jury impanelled may give their verdict upon the whole matter in issue, and shall not be required by court or judge to find the defendant guilty, merely on the proof of the publication by such defendant of the paper charged to be a libel. The statute merely removes the responsibility of deciding the ultimate issue of "libel or no libel" from the presiding judge to the jury, who are the judges who decide questions of fact under our law, where a trial takes places before them. The statute makes a new division of responsibility, but not a change of an old jurisdiction, or the creation of a new right inconsistent with its exercise. We are aware that some text writers incline to the opinion that Fox's Act limited the jurisdiction of justices to take sureties in cases of libel. We cannot agree with them. They do not observe

the effect of Lord Campbell's Act on this new question of jurisdiction. Our statute following in point of time Lord Campbell's, is essentially different from Fox's Act. It creates, as we have seen, a new right inconsistent with the old jurisdiction of the justices, and not cognizable by them. It would seem strange that the Legislature should render a defendant dispunishable for a publication beneficial to the public if he be charged with it in any court, or before any judge except a justice of the peace, and liable to find heavy sureties or to be imprisoned for default if brought before such justice. It seems the more reasonable interpretation of the law that, inasmuch as the truth is a defence in every case of defamatory libel, there is not any case of the kind cognizable before a tribunal which has no jurisdiction to take evidence upon the matter which is exculpatory if true, and that it must be regarded as the law of this colony that the jurisdiction of justices on a criminal charge in respect of defamatory libel is confined to sending it for trial before the court which has judicial cognizance of it, and where it may be fully and finally heard. We attach no importance to the sentimental argument that the jurisdiction of the justices over libels seems to have been first exercised in the Star Chamber. That court was suppressed for its exercise of arbitrary authority and for its excessive punishments, but the good and salutary portion of its criminal jurisdiction reverted to, or was absorbed by, and has since been administered in, the Court of Queen's Bench, whose jurisdiction we exercise here. Upon a conviction for defamatory libel, when the defendant has had an opporunity of using his statutory privilege, the judge may require sureties for good behaviour; there is, therefore, ample power to repress persistent or dangerous defamatory libels. We assume, as we think we are bound to do, these being printed libels, that the defendant has complied with the laws relating to licensed printing; that he is, in fact, lawfully pursuing his calling, and is entitled to the privileges and advantages of our statute (section 15). Our judgment in this case is restricted to instances of defamatory libel. Upon the whole, then, we think, that so long as our Act 11 Vic., No. 13, is in force, the jurisdiction of justices of the peace under the statute of Edward, in respect of defamatory libels, must be regarded as at least in abeyance, and the rule for a prohibition in this case must be made absolute. Looking at all the circumstances, however, we give the applicant O'Kane no costs; and considering the difficult nature of the question for decision, and believing that the justices and Morgan *bonâ fide* thought there was jurisdiction to deal with the case, we restrain the applicant from commencing any action against the magistrates or the respondent Morgan in respect of the proceedings below (14 Vic. 43, section 12).

Solicitor for applicant, *Edwards;* agent for *Marsland*, Charters Towers.

Solicitor for respondents, *Morgan*, Charters Towers.

IN INSOLVENCY.

HARDING, J. { April 12th, 1882. July 19th, 1882.

In re WILLIAM TAYLOR PERKINS, OF TOOWOOMBA, AN INSOLVENT.

The Insolvency Act of 1874, (38 Vic. No. 5) Sec. 168, subsec. 2.

On an application for a certificate of discharge under sec. 168, subsec. 2, of the *Insolvency Act of 1874*, some evidence will be required to show that the insolvency had been brought about by circumstances beyond the control of the insolvent, and for which he could not be justly held responsible, and the grant of a certificate of discharge after the expiration of two years is not a matter of right in the insolvent.

Sheridan applied on behalf of the insolvent, for a certificate of discharge.

After hearing argument, and having perused the affidavits, His Honor said that this was an application for a certificate of discharge under subsection 1 of section 167 of the *Insolvency Act of 1874*, under which it would be granted if it could be shown that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible. In a similar case

—the case of Quinn, (*ante*, 19) which had also been an application before him, he had laid down that the onus of proof lay on the insolvent, and that the insolvent must show that he could not reasonably be responsible for his insolvency. The circumstances of the present case, as gathered from the affidavits filed, were, that in 1870, the insolvent had borrowed £500 from the Bank of New South Wales, and that two years ago the bank sued him for £2,000, which was alleged to be due for principal and interest on the said £500. The action was proceeded with and a defence entered, as it appeared from the affidavits, on the advice of the insolvent's solicitors. The court had no means of knowing the nature of that advice, but judging from the affidavits it must have been of a cautious character, as the insolvent had to pay all the costs. The court was desirous to know the nature of the advice given. Looking back at the time of the adjudication, it appeared that the Bank of New South Wales were, at that time, creditors of the insolvent to the extent of £2,908 13s. 2d., being an increase of £908 13s. 2d. on the amount claimed at the time the action was commenced. In that action the insolvent had failed, and had put his creditors to an enormous expense, while his own costs had also been very great. He had then realised all his property, with a slight exception, and appeared to have paid it away to his solicitors. These proceedings appeared like oppression on his creditors. When a man was unable to pay his debts the insolvency laws allowed him protection, and the same laws gave protection to his creditors. By defending the action brought by the bank, the insolvent in this case had squandered his estate and opposed the doing of justice to his creditors, one of whom had taken the whole assets. Having been adjudicated insolvent on the petition of the bank, he now came into court and stated that his insolvency was due to the bank, and to his having to pay the costs of the action, which he had no right to defend to the prejudice of all his other creditors. The insolvent must, under all the circumstances, be held responsible for the insolvency, and the certificate must be refused.

On the 19th July, *Griffith, Q.C.*, applied for a certificate of discharge to the insolvent under subsection 2 of section 168 of the *Insolvency Act*, which provides that a certificate may be granted at the expiration of two years without the consent of any creditor. The learned counsel stated that an application had been made some time ago on the ground that the insolvency had arisen from circumstances for which the insolvent could not justly be held responsible, and that application was refused by His Honor. The circumstances of the case were, briefly, that in 1870, the insolvent had borowed £500 from the Bank of New South Wales, and that two years ago the bank sued him for £2,000, principal and interest on the said £500, and obtained judgment, including costs, to the extent of £2,908. The insolvent has practically had his certificate suspended for two years, which was sufficient punishment—if it was a case for punishment. If a man borrowed five hundred pounds on his property, and then twelve years afterwards was ruined by the action of the creditor in possession of the property, claiming by virtue of the mortgage, the whole amount of the loan with compound interest added, then the debtor deserved more consideration than the creditor. In this case the insolvent was within his legal rights in applying for a certificate of discharge; no one opposed the application; no creditor had proved in the estate; and he submitted there was no reason why the certificate should be withheld.

His Honor said this case was before him on the 3rd, 5th, and 12th of April, when an application was made under the first subsection of section 167 of the Act. That application was refused. Application was now made under section 168, subsection 2, under which it had been held by His Honor the Chief Justice, himself, and Mr. Justice Pring that some evidence should be required to show that the insolvency had been brought about by circumstances beyond the control of the insol-

vent, and for which he could not justly be held responsible, and that the grant of a certificate after the expiration of two years was not a matter of right in the insolvent. He still continued of that opinion. Were it not so, one could not understand why the whole of section 168 was subjected to the provision that the "court may, nevertheless, upon any such application, withhold the certificate or suspend the same for such period as it shall deem just." On the previous occasion he stated the facts, and he did not think they were materially altered now, except that Mr. Griffith had given him certain information as to the nature of the trial and the defence in the case of the Bank of New South Wales against Perkins. To the statements and observations of counsel, although not verified on affidavit, he should give due weight. On the last occasion he (His Honor) had laid down the rule, and what he thought was a principle, which should apply to insolvents who, immediately before their adjudication, unsuccessfully defended actions brought against them. He thought that when a man's circumstances were in such a plight that an adverse judgment would make him hopelessly insolvent, it behoved him before he defended such action to consider his position, and be very cautious. It behoved him to exercise such caution that when he was subsequently adjudicated insolvent he should be able to prove that he had only done that which a reasonable man would have done under the same circumstances. In this case doubt had been raised in his mind as to whether the defence of the action was the act of a reasonable man under the circumstances. The applicant had not brought himself within that rule, he had not shewn that his defence was the act of a reasonable man. The point that the application was not opposed had been disposed of in previous judgments, and standing alone was no reason why a certificate should be granted. It might not be worth while for creditors to offer any opposition. Considering the whole of the circumstances, he would allow the certificate to issue after the expiration of six months from two years after the adjudication, namely, on the 28th November, 1882.

Solicitor for insolvent, *Bunton*.

SOUTHERN DISTRICT COURT.

MR. DEPUTY JUDGE CHUBB. Aug. 17th, 1882.

M'GEARY *v.* VANCE.

APPEAL from a judgment given in the Small Debts Court, Ipswich. The action was for £21 10s. 6d., damages for conversion of the plaintiff's goods.

The facts were briefly these:—The plaintiff purchased the goods, consisting of flour and sugar, at the store of one John Hermann, shopkeeper, Rosewood, who was adjudicated insolvent shortly after the sale. The plaintiff paid for the goods at the time of the purchase, and took them home. The official trustee seized the goods, under a warrant of the Supreme Court, claiming them as the property of the insolvent, and subsequently delivered them to the defendant, who had been appointed creditors' trustee in the estate. The defendant, after notice and demand from the plaintiff, sold the goods by auction, and they realised £15 14s. 6d. The plaintiff then brought this action.

At the hearing, after the close of the plaintiff's case, *C. F. Chubb*, for the defendant, contended that the court had no jurisdiction, that the matter was properly within the jurisdiction of the Supreme Court, in insolvency, and that the plaintiff should have proceeded by motion or action in that court.

Cardew argued that the plaintiff was within his right, and that the court had jurisdiction. The bench decided to hear evidence for the defence, and afterwards non-suited the plaintiff without costs, although the plaintiff's attorney objected to be non-suited, and asked for a verdict either way.

After argument, His Honor said that it did not appear from the proceedings on what grounds the court below had non-suited. If because the police magistrate thought he had no jurisdiction, then a non-suit was incorrect. The proper course in that case would have been to strike the case out, and leave the plaintiff to obtain a mandamus to

compel him to determine it. But, putting that question aside, and dealing simply with the judgment as it stood, he was of opinion that the plaintiff had a good cause of action, and, on the evidence, was entitled to a verdict. The question of jurisdiction was not one for him to decide —that was for the Supreme Court; but, in his opinion, there was nothing to prevent the trustee of an insolvent from being sued in the Small Debts Court in trifling matters like the present. The result of the decisions was not to take away the concurrent jurisdictions of other courts on such matters, but that where the determination of the question depends upon the peculiar nature of our insolvency law, it was proper to take such matters to the insolvency tribunal. If a trustee was sued in any other court and thought he was embarrassed by such proceedings, he could apply to the Supreme Court for a restraining order, and, in a proper case, would get it. Each case depended on its own circumstances, and it was difficult to say what cases should and what should not be dealt with by the Insolvency Court alone, but in his opinion it would work great injustice to hold that in small matters, involving trifling sums of money, the expensive machinery of the Supreme Court should be resorted to for the settlement of them. Such a decision would amount to a practical denial of justice, as in many cases the costs would be twice as much as the amount in dispute. His Honor said he would allow the appeal, and set aside the non-suit, and send the case back for re-hearing; but if the parties consented he would give judgment in the case, as there was sufficient evidence to enable him to do so.

The respective counsel having consented, his Honor, after striking out £5 of the damages claimed, as too remote, reduce the plaintiff's claim to £15 14s. 6d., and gave him judgment for that sum, and £3 3s. costs of the appeal.

Solicitors for plaintiffs, *Foxton & Cardew.*

Solicitor for defendant, *C. F. Chubb.*

IN CHAMBERS.

HARDING, J. September 8th, 1882.

In re JAMES MARSHALL, DECEASED.

Administration of Land—"Intestacy Act of 1877."

IN this case application had been made to the Registrar for administration of the land of deceased, who died a bachelor and intestate, to be granted to his brother, Lewis Marshall, the only next of kin of deceased. It appeared from the affidavits filed that deceased died in 1867, at Mackay, leaving real estate there.

That the present applicant was not aware of this latter fact till the month of July, 1882.

That the Curator of Intestate Estates had not taken possession of the land, or obtained an order to administer the same.

That he had been served with a notice of the intention of the applicant to make the present application and had taken no steps.

The Registrar declined to make the grant.

On application to the judge in chambers the above facts were admitted, and it was urged that as the heir-at-law had not taken possession of the land within 12 months of the death of the deceased or within twelve months of the passing of the "Intestacy Act of 1877," that the land vested in the Curator under sec. 21 of that Act, and further, that without such grant being now made, transmission of the land to the heir-at-law under secs. 25 & 26 of the Intestacy Act, could not be entered up in the books of the Registrar-General.

Section 45 of the Act was also relied upon to show that even if the Curator had taken possession of the land, and partially administered the same, that the present applicant was in no worse position, as he would still, on proving his heirship, be entitled to a grant to administer.

His Honor said that a person dying intestate prior to the passing of the "Intestacy Act of 1877," and leaving land only, that such land went to his heir-at-law in the usual way, and could not be administered by a grant of the Court, unless such land had been taken possession of by the

Curator under the provisions of sec. 21 of that Act, and an order made thereunder for him to administer. This, however, not having been done in this case, sec. 45 of the Act did not apply.

Application for grant refused.

Solicitor for applicant, *Winter*.

LILLEY, C.J. September 13th, 1882.

ROSE *v.* GILLESPIE AND ROSE.

Will—Separate use—Proceed & proceeds—Corpus.

A widow, to whom her deceased husband had devised and bequeathed the residue of the proceeds of the sale of his real and personal property, gave by her marriage settlement the said residue to trustees in trust for herself until the solemnization of her intended marriage, and after, in trust for her absolute sole and separate use, and so that the receipts in writing of herself or such person or persons as she should from time to time appoint to receive from the trustees any sum or sums of money the proceed or proceeds of the said residue, should be a sufficient discharge therefor, and in trust for such persons as she should appoint by will, and in default, in trust for her next of kin.

Held, that she had full power of disposition over the *corpus* in her lifetime.

THIS was a suit brought by the plaintiff to ascertain what power of disposition she had over certain property contained in her marriage settlement, and if she had not absolute power of disposition of the property, then in the alternative a rectification of the settlement. The statement of claim stated as follows:—

1 & 2. The plaintiff is the wife of the defendant Thomas Rose, and was at the time of her intermarriage with the said Thomas Rose, the widow of one Mactaggart: The defendant Gillespie, is the sole trustee of the plaintiff's marriage settlement.

3. On the 25th day of January, 1870, the said Mactaggart, duly made and executed his last will and testament, the material parts whereof are as follows:—

"I give devise and bequeath to George Jones and Thomas Bloodworth their heirs executors administrators and assigns all my real and personal property whatsoever and wheresoever and of what nature and kind soever to have hold take and receive the same unto and to the use of them the said George Jones and Thomas Bloodworth their heirs executors administrators and assigns upon trust in the first place at such time or times and by such ways and means and upon such conditions and stipulations as to them may seem advisable to sell and dispose of all such real and personal property and to stand possessed of the proceeds arising therefrom and of any ready money of which I shall be possessed at the time of my decease upon trust after the payment thereout of my just debts funeral and testamentary expenses to pay to Daniel Mactaggart son of the Reverend Dougall Mactaggart at present of Edinburgh in Scotland Minister of the Church of Scotland the sum of £1,500 and to each of them my said Trustees the sum of £50 And stand possessed of the residue of such proceeds in trust for my wife Jane Eliza Mactaggart absolutely free from the debts control interference and engagements of any husband with whom she may inter marry."

4 & 5. The said Mactaggart died in January, 1871, and in April, 1872, the plaintiff, then Jane Eliza Mactaggart, married the defendant Rose.

6. Previously to the said marriage, the plaintiff, by an indenture dated the 28th of February, 1872, and made between the plaintiff of the first part, the defendant Thomas Rose of the second part, and Robert Travis and Douglas Helsham of the third part, after reciting that the said residue devised and bequeathed under the said will had not to the day of the date of the said indenture been paid over to or received by the plaintiff, and that the real and personal property which the said Mactaggart died possessed of was still in the possession of and under the control of the trustees of the said will, did grant, bargain, sell, assign, transfer, and set over unto the said Robert Travis and Douglas Helsham, the said residue of the proceeds of the sale of the said real and personal estate to hold upon certain trusts which as far as is material hereto were as

"Upon trust for the said Jane Eliza Mactaggart her executors administrators and assigns until the solemnization of the said intended marriage and from and after the solemnization of the said intended marriage upon trust for her absolute sole and separate use independently of the said Thomas Rose and not to be subject to his debts and engagements or control and so that the receipts in writing of the said Jane Eliza Mactaggart or of such person or persons as she shall from time to time appoint in that behalf to receive from them the said Robert Travis and Douglas Helsham or the trustee or trustees for the time being of these presents any sum or sums of money the proceed or the proceeds of the residue of the said real and personal estate shall be a sufficient discharge therefor And upon trust for such person or persons and in such manner as she the said Jane Eliza Mactaggart by her last will and testament or codicil thereto or any writing in the nature thereof shall notwithstanding her coverture give or dispose of the same and in default of and subject

to any such gift or disposition upon trust for such person or persons as would be entitled to her personal estate if she had died intestate and without having a husband and in the like shares and proportions as such person or persons would be entitled thereto."

The said indenture contained a power of appointment of new trustees—

7. Sets forth the intention of the parties to be that the property should be the plaintiff's absolutely with full power of disposition.

8. The appointment of defendant Gillespie as sole trustee.

9. No sale of the said residue of the real and personal estate was at any time made by the trustees of the said will.

10. Payment of the legacies.

11. Payment over and transfer to Gillespie of all the real and personal estate.

12. Plaintiff has never had any children and there is no probability of her ever having any.

13. Investment of part of the profits and income in lands which now held upon the trusts in the said indenture mentioned.

14. A large sum of money has been borrowed to complete the purchase of the said lands; but doubts have arisen whether the plaintiff has full power of disposition of the said residue of the real and personal estate.

15. Loss to the plaintiff and liability incurred by trustee.

The plaintiff claimed a declaration that she had full power of disposition over the property comprised in the said indenture of settlement and the land purchased as aforesaid in her lifetime, administration of the trusts. In the alternative a rectification of the settlement. The defendants denied paragraph 7, and demurred to so much of the claim as claimed that the plaintiff had full power of disposition over such property as aforesaid.

Joinder on demurrer.

Cooper, A.G., & Murray-Prior, in support of demurrer cited *Troutbek v. Boughey, L.R., 2 Eq., 534; Anderson v. Dawson, 15 Ves., 536; Davenport v. Bishopp, 2 Y. & C., Ch., 451, 460, 462; Kekewich v. Manning, 1 D. M. & G., 176, 183, 187, 188; Paul v. Paul, 15 Ch D., 580, and 19 Ch. D., 48.*

Griffith, Q.C., & Noel, for the plaintiff, cited *Holmes v. Godson, 8 D. M. & G., 152; Heatley v. Thomas, 15 Ves., 596; Taylor v. Meads, 4 D. J. & Sm., 597: Jefferys v. Jefferys, 1 Cr. & Ph., 138.*

LILLEY, C.J.:—In this case the defendants demur to the statement of claim so far as it prays a declaration that the plaintiff, Mrs. Rose, has full power of disposition over the property comprised in her marriage settlement, in her lifetime. Her claim for relief rests primarily upon that. The defendants, on the other hand, allege, that she has only a life estate, with a power of disposition by will or other instrument in the nature of a will, such as a codicil. The decision of this demurrer will depend upon the construction of the trusts of the settlement. It is a friendly suit, but I assume that all that is material to the construction of the instrument, that is, all the terms of the instrument itself so far as they are material to be placed before the court have been truly and fully set out, as I have not the indenture of settlement before me. That being so, it is my duty to give my construction of the instrument. It is material to observe the state of the property at the time the settlement was made, and, as I understand, there has been no change up to the present time. Now the property settled was the residue of the proceeds of the sale of the real and personal estate of her former husband, bequeathed to her by his will as her separate property. It was, therefore, her own property at the time of the settlement, but it remained unconverted by sale at the time the settlement was made previous to her second marriage with the defendant, Thomas Rose. The settlement recites that "the said residue devised and bequeathed under the said will had not to the day of the date of the said indenture been paid over to or received by the plaintiff, and that the real and personal property which the said John Daniel Mactaggart died possessed of was still in the possession of and under the control of the trustees of the said will."

It remained in specie, which is important. Then she granted to Travis and Helsham, and afterwards to the defendant Gillespie, who was made a trustee, "the said residue of the proceeds of the sale of the said real and personal estate," to hold upon certain trusts, which, so far as is material hereto were, upon trust for her until the solemnization of the said intended marriage, so that it remained her absolute property until the marriage, "and from and after the solemnization of the said intended marriage, upon trust for her absolute and sole and separate use independently of the said Thomas Rose, and not to be subject to his debts and engagements, or control." Standing alone, that is an absolute limitation to her, it is not limited merely to her life, but it is an absolute gift, that is, she retains her property in the condition it was in at the time of the marriage—her absolute sole and separate property. Then in connection with that the instrument goes on to say, "so that the receipts in writing of the said Jane Eliza Mactaggart, or of such person or persons as she shall from time to time appoint in that behalf, to receive from them the said Robert Travis and Douglas Helsham, or the trustee or trustees for the time being of these presents, any sum or sums of money the proceed or proceeds of the residue of the said real and personal estate, shall be a sufficient discharge therefor." It seems to me that the receipts authorised to be given by her relate to the *corpus* of the estate; the instrument may be so read, and there is no reason why it should be read otherwise, and I think the language is more naturally read to mean the residue of the proceeds of the sale of the estate, and that brings it within complete harmony with the trusts. That being so, we have here a woman possessed for her absolute separate use and retaining her control of the property after her marriage. Then is there anything in the subsequent part of the instrument to cut that down or to restrict that interest to a mere life estate. It is clear if the trusts had stopped there that she was absolute owner and could have made a will, and the property would have been liable to her debts under certain circumstances. I must look then to see whether there is anything in the subsequent trusts or subsequent language of the instrument which would cut down that full estate to one merely for life. The instrument proceeds, "and upon trust for such person or persons and in such manner as she the said Jane Eliza Mactaggart by her last will and testament or any codicil thereto, or any writing in the nature thereof, shall notwithstanding her coverture give or dispose of the same, and in default of and subject to any gift or disposition upon trust for such person or persons as would be entitled to her personal estate if she had died intestate and without having a husband, and in the like shares and proportions as such person or persons would be entitled thereto. It seems to me that the instrument provided for her future absolute control of the property as against her husband, unless she chose to give it to him by will, and if the property remained in her hands at the time of her death, and she died without making a will, the husband was to be excluded. It was not necessary to give her this power of disposition by will, she had it, if I am right in saying it was her absolute separate property, but she has unnecessarily reserved a power of disposing of it by will. If she does not dispose of it in her lifetime the property is to pass to the persons entitled under the Statute of Distributions, to the exclusion of her husband, unless she makes a will in his favor. The power of disposition by will is not a limitation of her power of alienation, her estate not being a mere life interest, and I think it is not an absolute declaration of trust in favor of the next of kin. I think she is entitled to full power of disposition in her lifetime in any way that an absolute owner could alienate, she is not a mere life tenant with power to appoint by will. If she does not dispose of it in her lifetime, the property is to go to her next-of-kin. The judgment therefore must be for the plaintiff, with costs out of the estate.

Solicitors for the plaintiff, *Hart, Mein & Flower.*

Solicitor for defendants, *Edwards.*

FULL COURT.

November 7th, 1882.

IN THE MATTER OF THE APPLICATION OF ROBERT BULCOCK FOR A WRIT OF MANDAMUS.

Electoral Rolls Act of 1879 (43 Vict. No. 5, ss. 9 & 19)—Quarterly Lists and Annual Lists.

It is no answer to an objection taken that the form of notice prescribed by sec. 19 of *The Electoral Rolls Act of 1879* has not been strictly comp led with, to say that the person on whom it was served is not prejudiced by the informality.

APPLICATION for a rule *nisi*, calling upon Moses Ward, W. Kent, and W. J. Page, J.J.P., and Robert Brodie, to show cause why a writ of *mandamus* should not issue commanding the justices to enter an adjournment of the hearing of the objection of Robert Bulcock to the name of Robert Brodie appearing on the electoral roll of North Brisbane, and commanding them further to hear and determine such objection.

The rule was moved for on the affidavit of Charles Edward Smith, solicitor for Robert Bulcock, stating that as such solicitor he appeared for him at the Revision Court held on Tuesday last before the justices named. On the 24th October, Bulcock gave notice to the clerk of petty sessions of an objection to Brodie's name being placed on the electoral roll of North Brisbane, in these words:—"I hereby give you notice that I object to the name of Robert Brodie being retained on the annual list for the electoral district of North Brisbane." Evidence of due service of the notice was given before the magistrate, when *Swanwick*, who appeared for Brodie, objected that the notice was bad, in that the word "annual" was used therein instead of "quarterly." The bench held that this objection was fatal, and refused to adjudicate upon or inquire into the merits of the objection raised by Bulcock.

Edwyn Lilley, in arguing in support of the application, quoted the various sections of the Act referring to the matter. He said it appeared that Brodie's name was on the quarterly list exhibited prior to the holding of the Revision Court, and that at the time the objection was raised the bench were considering the quarterly list, but Mr. Bulcock in his notice had used the word "annual" instead of quarterly. At the same time the court was the annual revision court. Brodie was not in the least prejudiced by the use of the one word instead of the other in the notice of objection, as he was present at the court, and had the objection taken on his behalf.

LILLEY, C. J.:—The Act is imperative on the point. The 9th section provides that every objection "shall be" in the form, and subject to the provisions of the 19th section of the Act; while the words of the form given in the 19th section are—"I hereby give you notice that I object to the name of———being retained on the [annual or quarterly, *as the case may be*] electoral list of the police district," &c. When a statute says a thing shall be in a certain form, the question of whether anyone is prejudiced or not, can not be considered, and where a man's public right is sought to be affected, the law must be interpreted strictly. Why the statute is imperative is not for the court to say. The rule *nisi* must be refused.

HARDING and PRING, J.J., concurred.

Rule *nisi* refused accordingly.

Solicitors for applicant, *Smith & Smith*.

IN THE MATTER OF AN ARBITRATION BETWEEN ELIZA DE CASTRES AND JOHN GARD.

Arbitration—Withdrawal of umpire—Subsequent award.

ELIZA DE CASTRES and John Gard were partners in a soda-water manufactory at Charters Towers. By clause 23 of the deed of partnership, all disputes as to partnership matters were to be referred to two arbitrators, who had power to choose an umpire who, if the arbitrators disagreed, was to decide alone all matters in dispute. Certain disputes having arisen, two arbitrators—John Archibald and Joseph Harvey—were appointed, who chose John McDonald as umpire. Nine days after all the evidence had been taken, and advocates for both parties had closed their cases before the arbitrators and umpire, but before

any award had been published, the umpire wrote the following letter to the parties:—

Charters Towers, Aug. 12th, 1882.

In the matter of arbitration between John Gard and Mrs. De Castres.

To MESSRS. JOHN ARCHIBALD and JOSEPH HARVEY.

GENTLEMEN—

On the last occasion of meeting as arbitrators and umpire in the above matter, I learned for the first time that our decision in this matter would not necessarily be final, either party having the option of appeal to the Supreme Court. I intimated to you then that I would not act further in the matter as umpire unless the parties signed a deed of arbitration making our decision final, and binding on both Mr. Gard and Mrs. De Castres. If the deed of arbitration is prepared and executed I will willingly proceed; but, if otherwise, then be good enough to accept this as notice from me that I retire from the arbitration.

I am, Gentlemen,
Yours faithfully,
JOHN MCDONALD.

The contents of this letter were communicated to Mrs. De Castres and John Gard, who both refused to execute such a deed as the umpire required. On the 31st August, the umpire, without any notice to either party, published his award, by which he *(inter alia)* declared the partnership dissolved, directed the arbitrators to take possession of the partnership property, and directed a sale thereof.

On the 5th October, the submission to arbitration was made a rule of court. On the same day a rule *nisi* was obtained to set aside the award on the following grounds:—

(1) That before making the said pretended award, the authority of the umpire had terminated by his refusal to proceed with the reference, and his giving notice of such refusal to the parties.

(2) That the said umpire exceeded his authority in directing John Archibald and Joseph Harvey to take possession of the property of the partnership subsisting between the parties, and directing a sale thereof.

(3) That the said umpire exceeded his authority by directing a dissolution of the said partnership, and otherwise awarding upon matters not in difference between the parties.

On November 7th, *Griffith, Q.C.*, (*Mansfield with him*), moved the rule absolute.

Real showed cause. As to ground 1, he submitted that:—(1) The letter of August 12th, 1882, was not a final withdrawal. (2) The umpire told the arbitratrors afterwards he would proceed, as he found his decision would be final. By *Interdict Act, sec. 16*, the arbitrators could re-appoint. As to grounds 2 and 3, he quoted *Russell on Arbitration, 119; Charlton v. Spencer, 3 Q.B.D. 122; Lewin v. Holbrook, 11 M.&W, 110; Darby v. Whitaker, 4 Drew, 134; In re Randall, Saunders & Coy., 1 Q.B.D., 748.*

Griffith, Q.C. in reply, submitted as to ground 1: (1) When an umpire withdraws he cannot come back; (2) No re-appointment. If so, it ought to be made before reference. As to grounds 2 and 3, he referred to *In re Mackay, 2 A. & E., 356.*

The rule was made absolute, with costs, on the ground that the umpire had withdrawn from the arbitration and thereby terminated his authority, and that he could not resume it without the consent of both parties.

Solicitors for Eliza De Castres, *Edwards & Marsland.*

Solicitor for John Gard, *Bunton.*

MILLS *v.* { DAY DAWN BLOCK GOLD MINING COMPANY LIMITED, ALEXANDER YOUNG AND JOHN MALONE.

Gold Fields Act of 1874, and Regulations thereunder—Applications for gold mining leases—refusal of lease by Minister—Priority—Forfeiture.

IN September, 1879, under and in accordance with *The Gold Fields Act of 1874*, and the regulations made thereunder, the plaintiff applied for a lease of a portion of auriferous land on the Charters Towers Gold Field. His application, which was numbered 252, was received and recorded by the Warden. Before the Warden had reported on the application, the defendants, Young and Malone, under regulation 81, applied for the cancellation of No. 252, on the ground of non-representation according to the regulations.

Regulation 81 of 1874, is as follows:—

"In all cases in which no objections have been lodged against any lease within thirty days from the date of the application being lodged with the Warden, the ground applied for shall, until the decision of the government is made known, be worked half-handed; but when intimation has been given that the application has been granted, the ground shall, within one month, be effectually and continuously worked full-handed. A failure to comply with this clause will entail forfeiture, whether the lease has been issued or not."

On 9th April, 1880, the Warden, after hearing evidence, refused to cancel No. 252, and on 13th May, 1880, he reported on No. 252 to the Minister for Mines and recommended that a lease should be issued to the plaintiff. On the 1st June, 1880, the Minister for Mines rejected the plaintiff's application on the ground of non-representation. On the 2nd June, 1880, the plaintiff made a fresh application, numbered 290, for a lease of the same and some additional land, but the Warden refused to receive the plaintiff's application. On the 5th June, 1880, the defendants, Young and Malone, made an application, numbered 270, for a lease of a large part of the land comprised in No. 290, which application the Warden received and recorded, and under that application for lease the defendants, Young and Malone, took possession of the land and they and their transferees, the Day Dawn Block Gold Mining Company Limited, have occupied and worked it ever since. On the 10th May, 1881, a writ of *mandamus* was issued out of the Supreme Court directed to the Warden commanding him to receive, record, and report on No. 290, the receipt of the application to date as of 2nd June, 1880. The Warden received and recorded No. 290 on 21st May, 1881. The plaintiff then brought this action for trespass against the defendants in respect of the auriferous land occupied and worked by them. On the 13th of October, 1882, on the application of the plaintiff, His Honor The Chief Justice, under Order XXXIV, r. 2, of the Judicature Act, ordered that the question of law whether plaintiff's application for lease No. 290 had priority over defendants' application No. 270 should be decided before any question of fact was decided in the action, and that the said question of law should be argued before the Full Court on November 7th.

The *Attorney-General, (Griffith, Q.C., and Real with him)*, for the plaintiff.

Garrick, Q.C., (Mansfield with him), for the defendants.

The following were the plaintiff's points for argument:—

(1) That under the regulations in force in June, 1880, applications for leases were entitled to priority according to the date at which they were tendered to the Warden.

(2) That under the said regulations an application prior in point of time did not lose its priority by reason only that a previous application had been refused.

(3) That under the said regulations an application by a person who had objected to the grant of a previous application for a lease, which previous application had been refused, does not, by reason of such objection and refusal, become entitled to priority over a subsequent application by the first applicant which was prior in point of time to that of the objector.

The following were the defendants' points for argument.

(1) That the application of defendants, Alexander Young and John Malone, for lease No. 270, is entitled to priority over plaintiff's application for lease No. 290 under regulation 7 of the 1st June, 1877, under *The Gold Fields Act of 1874*.

(2) That under the regulations in force in June, 1880, applications for leases were not entitled to priority according to the date at which they were tendered to the Warden.

(3) That under the said regulations an application prior in point of time did lose its priority by reason only that a previous application by the applicant had been refused.

(4) That under the said regulations an application by a person who had objected to the grant of a previous application for a lease, which previous application had been refused, does by reason of such objection and refusal become entitled to priority over a subsequent application by the first applicant which was prior in point of time to that of the objector.

Griffith, Q.C., for plaintiff, contended—

(1) That the priority of No. 290 over No. 270, was priority in point of time; that regulation 7, of 1st June, 1877, applied to leases only, not to applications for lease. The regulation is as follows:—

(7) "Any miner or party of miners giving notice to the Warden of a gold-field that a leasehold is not being worked in acordance with the conditions of the lease, and applying for the forfeiture thereof, shall, in the event of such leasehold being forfeited, have a preferent right for seven days after such forfeiture to take possession of the ground so forfeited or any portion thereof, as a claim, or to apply for the same as a leasehold."

(2) That even if this regulation did apply to applications for leases, the refusal of a Minister to grant the lease did not constitute a forfeiture.

(3) That if this were a forfeiture the plaintiff had a right to be heard before forfeiture was pronounced against him. *Smith v. The Queen, 3 App. Cases*, 614.

Regulation 8 of 1874, only means that the granting of the lease does not prevent evidence being given of breaches of conditions committed before grant.

Garrick, Q.C., for defendants, submitted—

(1) All regulations, from No. 77 to 86, of Regulations of 1874, apply to applications for leases as well as to leases—*e.g.*, sub-sec. 9, of regulation 77. Plaintiff's interpretation of regulation 81, was a forced one—regulation 81 applied in express terms to applications for leases.

(2) There was a forfeiture in consequence of a ministerial act; therefore, plaintiff was not entitled to a hearing.

[Refers to sec. 15 of the Act of 1874.]

That the Minister is not obliged to call evidence or to hear the parties. He may refuse or grant the lease. MacFarland's Digest of the law of Mining, p. 90; Title Lease, Nos. 6 & 7.

Griffith, Q.C., in reply: The statute gives a right to the first applicant—can be no ministerial forfeiture. Sec. 15 of Act of 1874, merely gives a right of entry.

LILLEY, C.J.:—In delivering the judgment of the court, said: In this case, by an order made by myself on the 13th October, 1882, it was referred to the Full Court to consider the question of law, whether the application of the defendants, Young and Malone, for lease No. 270, was entitled to priority over the plaintiff's application for lease No. 290, by reason of the application made by the defendants to the Warden for the cancellation of the plaintiff's previous application for lease No. 252. In pursuance of that order, the parties stated the points which they intended to argue, and those most material, in fact, the only points for consideration are those under the first and second headings:—1. "That under the regulations in force in June, 1880, applications for leases were entitled to priority according to the date at which they were tendered to the Warden. 2. That under the said regulations an application prior in point of time did not lose its priority by reason only that a previous application by the applicant had been refused." These are the plaintiff's contentions. The question raised upon the pleadings also, in the fifth paragraph of the plaintiff's statement of claim, is one of refusal. The plaintiff alleges, and it is not denied, that his application for lease No. 252, was refused by the Governor on or about the 1st June, 1880. No question of forfeiture is raised upon the pleadings unless there is anything in the Act, or the regulations making a refusal a forfeiture. That is the issue—whether a refusal disentitles the plaintiff to priority for his renewed application, made immediately after the refusal of his application, No. 252. It may be convenient here, to briefly recapitulate the actual facts. The plaintiff applied for a lease, that application was

numbered No. 252. Subsequently the defendants brought the matter before the Warden upon a complaint that the claim was not represented, I suppose, not being worked by the number of men required by the regulations. The Warden heard that complaint and decided adversely to it, because he recommended to the Governor that the plaintiff should have an issue of his lease. Notwithstanding that report and recommendation, the Minister—the Crown—refused the plaintiff his lease on the application No. 252. There is no allegation in terms and nothing on the pleadings that I can discover to show that it was a forfeiture. The presumption, in the absence of any allegation or evidence, would be that it was a mere refusal. We cannot presume, a forfeiture, which it seems to me must be a substantive declaration. He applied for lease, No. 252, and was refused that lease. Is there anything then, in the statute or the regulations giving a refusal the character of a forfeiture. If it was a forfeiture in terms, it is a remarkable fact that the parties will not say so. The parties in their pleadings have refused to call things by the names they seek to give them upon the argument. We can only deal with the record, and I propose not to travel out of it.

By section 10 of *The Gold Fields Act 1874*, the Governor is authorised to grant leases subject to the provisions of the Act and of the regulations; "for any term not exceeding twenty-one years, and to renew the same for any such term at the yearly rental of £1 per acre, and upon the terms and conditions prescribed by the regulations." These are to be mning leases. By the 12th section—

"Every mining lease issued under this Act or the regulations shall contain a condition that if the lessee his executors administrators and assigns fail at any time during the term to fulfil the conditions or terms therein contained or to use the land *bonâ fide* for the purpose for which it shall be demised the lease shall for any such failure be voidable at the will of the Governor."

No lease was issued here and all the conditions which relate to leases appear to be set aside from the question. This was a mere application, which was refused. If the Governor had intimated his acceptance of the application it might have been called a granting of a lease, although it would not have been an issue of a lease. By the 12th section, therefore, there is something in the nature of a forfeiture. The lease was voidable at the will of the Governor upon failure of conditions. Voidable by the will of the Governor, I think, means voidable upon a regular inquiry, something in the nature of judicial proceedings.

By the 13th section—

"When any land a mining lease of which shall be applied for shall be or shall comprise the whole or part of land held by the applicant under a miner's right the interest of such applicant under such right shall in no wise be affected by such application or by the refusal or abandonment or failure in any other way thereof."

Now, there are clearly three things recognised by the statute—a forfeiture at the will of the Governor for breach of conditions; a refusal or abandonment; or failure in any other way—so that a refusal is a distinctly recognised matter under the statute itself. Then the 14th section gives a right to the applicant.

"The entry upon occupation of or interference with any ground so applied for as aforesaid by any person who shall not prior to such application have been in the lawful occupation of such ground shall at any time after the lodging of such application and until and unless such application shall be refused or such entry or occupation or interference shall have been authorised by the Governor be deemed to be a trespass or encroachment. And the applicant for the said ground may proceed for such trespass or encroachment and for any damages in respect thereof and for the recovery of any gold taken by such first-mentioned person from the said ground or for the value thereof before any Warden's Court."

Now the applicant there until the refusal of his application has certain rights, he can sue for trespass, and he can recover any gold taken from the ground, whether in his own right or on behalf of the Crown, it is not for me to say. He has a right to sue for trespass until the refusal of his application by the Governor. There may be a discretion to be exercised, but there is the fact that as against forfeiture, a refusal is distinguished by the statute, so that the pleading comes within the terms of the statute, and I do not propose to travel out of it.

By the 15th section—

"In case any lease granted under the authority of this

portion of this Act or the regulations or of any Act authorising the granting of leases for mining purposes, shall be or be liable to be forfeited or determined by any breach of condition or otherwise."

There is a power of re-entry given to the Crown, so that again we have forfeiture distinguished from refusal all through the statute. As to the first point—whether application for leases are entitled to priority according to the date at which they were tendered to the Warden, I think, there can be no doubt upon the true construction of the 14th section, which gives a protectorate of the ground and the gold to the first applicant, until the refusal of his application. The first applicant has that right, a possessory right, and a right of protectorate over the ground and gold until the Crown has notified a refusal of his application. That would be sufficient to give him priority. Then as to the second point—that an application prior in point of time did not lose its priority by reason only that a previous application by the applicant had been refused. Immediately after (to continue the statement of facts) the refusal by the Governor of application No. 252, the plaintiff put in another application. There was no application then in on behalf of the defendants, and that is the question now raised—whether that application tendered immediately after the refusal of No. 252, takes priority over an application put in by the defendants afterwards. I have already said, that being first in point of time, it would take priority. What would be the effect if there had been a forfeiture is another matter, and it is not for me to consider. The application put in immediately after the refusal of No. 252, required, I think, to be dealt with in the same way as an application by any other party. That application was rejected by the Warden, and he was compelled by *mandamus* from this court, to receive, record, and report upon that application of the plaintiff. In the meantime, however, before any proceedings had been taken for *mandamus*, and after the Warden had refused to receive, record, and report upon the application, the defendants had put in an application, No. 270. The Warden was compelled by this court, to receive, record, and report upon the application of the plaintiff, and that application was numbered 290. There is no dispute that the plaintiff's second application, although numbered later than the defendants', was in first. Being first then in point of time it is entitled to priority, unless there is something in the regulations or in the Act which would deprive it of that status. There is nothing in the Act or regulations to prevent a man having had one application refused putting in another, there is nothing to prevent him so doing. The objection to the first application may be removed or cured by his subsequent application; and I cannot say, that being once refused, he is disentitled to apply a second time for the same ground. The plaintiff, put in his second application immediately, and, I think, he is entitled to priority. The question of forfeiture is not one for our consideration, it was raised in the argument, but it was not stated in the pleadings. What might be the position of the plaintiff if there had been a forfeiture, I think, it unnecessary to say, as it may be a matter for argument in another case, and I do not think it desirable to travel out of the record, and to give a speculative decision. I think, then, that the plaintiff's application, No. 290, is entitled to priority of consideration—I go no further—by the Minister. I say nothing as to what discretion or power he may have in dealing with it, as that is quite unnecessary. The application is entitled to priority of consideration. The costs will be paid by the defendants.

Solicitor for plaintiff, *Thynne;* agent for *Morgan*, Charters Towers.

Solicitor for defendants, *Chambers.*

IN CHAMBERS.

PRING, J. Nov. 20th, 1882.

IN THE WILL OF LIVINGSTON PATERSON, DECEASED.

Will — Executor not resident in Queensland — Probate.

LIVINGSTON PATERSON, late of Fernlee Station, in this colony, died at Sydney, in New South Wales, having executed a will, dated the 4th of May, 1882, by which he appointed J. A. Paterson, L. P. Bain, and J. L. Delòitte, executors. The two last mentioned executors renounced probate. All these executors are residents of Sydney aforesaid. A great portion of the deceased's property, is station property in this colony. J. A. Paterson, applied to the Registrar for probate of the said will, but the Registrar refused the application, on the ground that the said executor was resident without the jurisdiction of the Supreme Court of Queensland, and that no affidavit had been filed showing that there was no debts due in this colony.

Griffith, Q.C., in support of the application, stated that the only difficulty in the case was that the executor, J. A. Paterson, was resident out of the jurisdiction. He contended that an executor took his title from the will, and was not like an administrator who was the officer of the court, and that a testator could appoint any executor he pleased.

Section 32 of the *Probate Act*, gave the court power to appoint an administrator out of the jurisdiction, but that section did not apply to this case. The English practice was different to ours, and he submitted the court would not decline to make the grant unless some of the special circumstances mentioned in section 32 existed, but would follow the English practice. He referred to *Lyons v. Balfour, 2 Adams, 501; In the Goods of D. F. de Angulo Urmella, L R., 1 P.&D., 598; In the Goods of Sampson, L.R., 3 P.&D., 48.*

The Registrar relied on—*In re Hope, Queensland Law Journal Reports, p. 11*, which was a similar application to the present, and said in that case executors domiciled in South Australia had to furnish the court with evidence that no debts existed in this colony before probate was granted, which was all that was asked in this case.

PRING, J., considered the English practice should be followed, and ordered probate to be granted. No special circumstances existed under sec. 32 of the *Probate Act*, so far as he was aware, and it was for the creditors or other persons interested to bring such circumstances before the court by opposing the application. The executor could not be required to swear that there were no debts.

Solicitors for executor, *Hart, Mein & Flower.*

HARDING, J. Nov. 21st, 1882.

IN THE MATTER OF THE APPLICATION OF ROBERT BULCOCK FOR A PROHIBITION AGAINST MOSES WARD AND OTHER JUSTICES AND FREDERICK H. HANNINGTON.

Electoral Rolls Act of 1879 — Jurisdiction of Magistrates as to costs.

THIS was a motion to make absolute a rule *nisi* granted by His Honor on the Monday previous for a writ of prohibition, calling on Moses Ward, William Joseph Page, William Henry Kent, and William Thorne, justices of the peace, and Frederick Hapham Hannington, to show cause why they should not be restrained from proceeding in respect of an order for costs made by the justices under the *Electoral Rolls Act of 1879.*

Griffith, Q.C., appeared to move the rule absolute; and the *Attorney-General* showed cause on behalf of the respondents.

The *Attorney-General* said the objection which had been lodged by the appellant was against Hannington's name being retained on the "annual list," whereas it never was on that list, but only on the "supplementary list;" and if the notice referred to the annual list it was bad as to date, having been given on 24th October instead of before the 1st October as provided by the statute. He contended that an objection having been once made it could not be withdrawn, and that the magistrates were justified in granting costs when the matter came before them.

Griffith, Q.C., in reply, said the statute enacted that the revision court might grant costs against the objector if it should appear that he had "made or attempted to sustain any groundless, frivolous, or vexatious claim or objection." He argued that the matter never having arrived at the stage of inquiry and adjudication by which alone it could be determined whether the objection was groundless or frivolous, and as the justices had no general power to give costs, the order made by them in the present case should be quashed.

His Honor thought the order of the magistrates extra-judicial, and made the rule absolute.

Solicitors for applicant, *Smith & Smith.*

Solicitors for respondents, *Daly & Hellicar.*

IN INSOLVENCY.

Lilley, C.J. November 21st, 1882.

IN THE INSOLVENT ESTATE OF JAMES MACPHERSON OF BOGANTUNGAN, PUBLICAN.

"Insolvency Act 1874"—Rights of Creditors under second insolvency, first insolvency not having been closed.

On the 3rd November, an application, under sec. 127 of *"The Insolvency Act 1874"* on behalf of the Official Trustee in the insolvent estate of James Macpherson, was made for the opinion, advice or direction of the court concerning matters connected with the estate. Macpherson became insolvent in 1876, when Mr. Miskin was appointed trustee, his interest afterwards devolved upon Mr. Newman who succeeded him as Official Trustee. In October 1882, the insolvent, without having had his previous insolvency closed, and not having obtained a certificate of discharge, was again adjudicated insolvent. The creditors in the second insolvency appointed Carl Harden of Rockhampton the trustee of the estate. Under the first insolvency only two debts were proved and no assets were realised. Previous to the second insolvency Macpherson had been carrying on business for some time and had obtained assets. These assets the trustee under the second insolvency claimed and the question for the opinion of the court was, whether the Official Trustee should hand over these assets or whether the creditors under the first insolvency had not a prior right to them.

Griffith, Q.C., (Byrne with him) for the Official Trustee, cited *Ex parte Ford, In re Caughey, 1 Ch. D., 521; Ex parte Watson, In re Roberts, 12 Ch. D., 380; Morgan v. Knight, 15 C.B., N.S., 669; 33 L.J., C.P., 168.*

Real for the creditors under the first insolvency cited, *Ex parte Broadbent, W.N., 1882—110.*

Edwyn Lilley for the trustee under the second insolvency.

Lilley, C.J.:—The Official Trustee has asked for my direction upon the statements of facts submitted to me in writing. I am asked to say whether the property of the insolvent is to be delivered to the Official Trustee under the first insolvency, or to the creditor's Trustee under the second. There are two questions of law raised in the matter—1st, whether the first insolvency being unclosed and subsisting, a second insolvency can be valid and have any effect? Upon that, I think, the authorities are clear. *Morgan v. Knight, 15 C.B., N.S., 669; 33 L.J., C.P., 168. Ex parte Ford, In re Caughey, 1 Ch. D., 521,* and other authorities have determined that question, that a second insolvency may be effectual although a first insolvency may be still in force. Then the second question is, whether the Official Trustee under the first insolvency, has by his conduct lost his right to administer the future acquired property of the insolvent, as against a creditor's trustee, who has been elected under a second insolvency? There is no doubt, that under our law, where an insolvent has not got his certificate, and where the first insolvency is unclosed, future acquired property would vest in the Official Trustee under the first insolvency, unless he has done something to lose his right to possess and administer it; if he has, the title of the creditor's trustee under the second insolvency would prevail. The question then is one of fact, did

the Official Trustee under the first insolvency, consent and permit the insolvent to possess and deal with the after acquired property? If so why then the doctrine of reputed ownership would come in. The trustee, who is the owner of the property by virtue of the insolvent law, is in no better position than any other owner. Upon the authorities if he stands by and permits a man to trade and deal with property as his own, he may, as against a trustee under another insolvency, lose his right to possess and administer it. It depends upon the view I take of the conduct of the Official Trustee. When a man has left the court without his certificate, there is no obligation on the trustee to exercise any surveillance over him, but if he receives positive information that the insolvent is possessed of after acquired property, I think, it is his duty to look after it, and if he does not he runs the risk of losing the administration of it, when the insolvent has dealt with it in such a way as to create new obligations and new rights. I have had some difficulty in determining the matter, simple as the facts are, but I have come to the conclusion that the Official Trustee really permitted the insolvent to trade with this after acquired property, and that it ought to go to the creditor's trustee under the second insolvency. The determination of the right depends upon the construction I put upon this correspondence. The original insolvency occurred in 1876, and for six years, the trustee, and for three years, the creditors under the insolvency, have utterly neglected their rights with the knowledge that this man was carrying on business again in the same place, and creating new obligations and new rights.

"Mr. J. Macpherson, late of Gogango, filed his schedule some time ago; he has been carrying on the same business, blacksmith and publican, Cometville, ever since, but has done nothing towards liquidation. We should like to know as one of his creditors if anything can be done in the matter."

Now there is a positive statement, absolute information to the trustee, and we will see the reply. If he chose to disregard it and shut his eyes to the fact, subsequent parties are not to be prejudiced.

"In reply to your letter on 23rd instant, presuming the above insolvent to be the person referred to, I find that the only assets returned in his statement of affairs, filed 20th February, 1877, were some £300 worth of book debts, which my predecessor, Mr. Miskin, evidently found worthless and impossible to collect. The only creditors who have proved in the estate are yourselves and Messrs. Henry Jones & Co., and to date, nothing has been realized. If the insolvent is really trading in his own name and the property or rather stock-in-trade is his own I shall have no hesitation in attaching it, but prior to taking this step I shall be glad to receive from you definite information on this head, and seeing that there are no funds available, I shall further require from yourselves and Messrs. Jones & Co., a letter of indemnification in respect to costs incurred, as it might be that the property seized would not be of sufficient value to cover the expenses of levy, &c."

Under this positive information there is no doubt they told him distinctly the insolvent was trading with after acquired property, he rests upon that for three years, the reason that he has stated for so doing is, because they would not give him a letter of indemnification. I think, therefore, that the administration of the property must go to the creditor's trustee under the second insolvency. The Official Trustee and the creditor's trustee to have their costs out of the estate. The creditors under the old insolvency will not get costs.

Solicitor for Official Trustee, *Macpherson.*

Solicitor for Creditors' Trustee, *Bunton.*

Solicitors for creditors under 1st insolvency, *Rees Jones & Brown.*

FULL COURT.

December 5th, 1882.

In re JOHN DONALDSON OF IPSWICH, AN INSOLVENT, *Ex parte* GEORGE HENRY NEWMAN, OFFICIAL TRUSTEE OF THE ESTATE.

Insolvency Act of 1874, s. 108—Assignment of all debtor's property—Reasonable and sufficient consideration given at the time.

A bill of sale including all the existing property of a trader, and containing a power to seize all after acquired property was made by him in favour of a creditor, in consideration partly of an existing debt and a parol agreement to pay the debtor's existing debts, and to provide means to carry on the business. On and about the date of the execution of the bill of sale, all the existing debts made known to the said creditor were paid, and sums were advanced by him for the purpose of carrying the debtor on

in his business. Evidence was admitted at the hearing to prove the real consideration of the deed:—

Held, that the bill of sale was not an act of insolvency, and that under the 108th section of the Act there was a reasonable and sufficient consideration given at the time.

THIS case was heard before His Honor Mr. Justice Pring on the 25th, 26th, and 27th, of October, 1882, on the following Notice of Motion:—

"Take notice that this Honorable Court will be moved before His Honor Mr. Justice Pring on Wednesday 27th day of September instant at ten o'clock in the forenoon or as soon thereafter as Counsel can be heard by Mr. Griffith Q.C., of Counsel for G. H. Newman the Official Trustee of the estate of the abovenamed insolvent that it may be declared that a Bill of Mortgage registered No. 71003 from the abovenamed insolvent to Robert Walker Wilson and Gilbert Wilson dated the 24th March 1881, to secure repayment of £160 on demand with interest at 9% per annum, a Bill of Mortgage registered No. 72052 from the said insolvent to the said Robert Walker Wilson and Gilbert Wilson dated the 23rd April 1881 to secure repayment of £465 on demand with interest at 9% per annum, a Stock Mortgage registered No. 153 Book 15, dated the 28th March in the year aforesaid from the said insolvent to the said Robert Walker Wilson and Gilbert Wilson to secure repayment of £465 on demand with interest at 9% per annum added, and a Bill of Sale registered No. 92 Book 15, dated the 29th March in the year aforesaid from the said insolvent to the said Robert Walker Wilson and Gilbert Wilson to secure repayment of £465 on demand with interest at 9% per annum and further advances, were fraudulent and void as against the said Official Trustee and that the said R. W. Wilson and G. Wilson be ordered to pay to the said Official Trustee, the value of the property comprised in the said securities. Or that if the said securities are not so fraudulent and void as against the said Official Trustee that the several payments to creditors of the said insolvent more particularly set out in the schedule hereunder written and which are deducted by the said R. W. Wilson and G. Wilson from the proceeds of the property comprised in the said securities are improperly deducted and that the said R. W. Wilson and G. Wilson may be ordered to pay the amount of such payments to the said Official Trustee. Or otherwise that the rights of the said Official Trustee in and to the property comprised in the said securities and as to the amounts of the payments mentioned in the schedule hereunder written may be declared void or for such further or other order as the Court may direct.

"Dated the 20th day of September, 1882."

The Schedule above referred to.

1881.		£	s.	d.
March 5,	Paid Retiring P/n (Wilson Bros.)	305	11	0
23,	Paid A. J. Thynne on a/c Perkins & Co.	92	6	2
,,	Mort & Ricardo for bullocks ...	101	5	0
,,	Wilson Bros., commission paying Mort & Ricardo	2	10	7
,,	J. R. B. Bruce	77	13	10
,,	Landy Bros. for sheep	19	10	10
,,	Wilson Bros., commission paying Landy Bros.	0	9	9
,,	P/n due to J. Ivory	188	8	9
April 12,	Scott & McGregor's a/c	153	2	0
21,	Ginn & Hooper	44	13	1
22,	Scott & McGregor, for sheep ...	27	15	0
May 2,	W. Coleman's a/c	22	10	0
12,	J. R. B. Bruce, costs of mortgages	18	14	0
June 1 & 2,	Ginn & Hooper's a/cs	230	5	5
8,	A. J. Thynne	150	0	0
		£1227	15	5

Griffith, Q.C., Real, & Lilley, for the Official Trustee.

The Attorney General (Pope Cooper) & Prior, for Wilson Bros., the respondents.

The facts sufficiently appear from the judgment.

PRING, J.:—It was admitted that the bill of sale and the stock mortgage mentioned in the notice of motion were one and the same document—namely, the cattle mortgage of the 29th of March. A great deal of evidence, oral and documentary, was adduced on either side, including the three deeds mentioned in the notice of motion. The dates of these deeds are the 24th and 29th of March, 1881, and the 23rd of April, 1881. I reserved my decision. The case may be stated thus:—On the 22nd of March, John Donaldson (the insolvent) was indebted to Wilson Bros., of Brisbane, stock and station agents, in the sum of £805. Donaldson was then carrying on the business of a butcher in Ipswich, and owned some property in South Brisbane, the title deeds of which were in the hands of Mr. Thynne, his solicitor. On the 22nd March, 1881, Donaldson called on Thynne, and having been served with a writ at the suit of Perkins & Co., and being much annoyed at the service, expressed a wish to be adjudicated insolvent. Thynne then made a pencilled memorandum of Donaldson's statement of his assets and liabilities. When this statement had been made out Thynne told Donaldson

that it was a pity that he should be adjudicated insolvent, as he (Thynne) thought the business was a good one and would pay. Donaldson was a constituent or customer of the respondents (Wilson Bros.) and consigned produce, consisting of hides, tallow, &c., to them for sale. Thynne, on the same day (22nd March), waited on Mr. R. W. Wilson (one of the members of the firm), and showed him the statement as per memorandum, and said he thought the estate would pay, and requested Wilson to consider if he would not pay off all those liabilities, and take security over the assets and enable Donaldson to carry on the business. Wilson said he would consider it. At three o'clock on the same day (22nd March) Wilson went to Thynne's office and there met Donaldson and Thynne. Referring to the Grampian Hills estate, Donaldson said it was a splendid purchase, and also gave Wilson and Thynne to understand that he had paid £500 deposit, and the balance of the purchase money was a secured debt on the property. He represented it as a transaction entirely apart from his business. Wilson said he would consider Thynne's proposal. Thynne then represented to Wilson that it was absolutely necessary that Donaldson should as soon as possible pay off two pressing creditors, Perkins and Co., and Cribb and Foote. Mr. Thynne at this time had the deeds of some land in South Brisbane belonging to Donaldson. Thynne said that until Wilson had made up his mind to carry Donaldson on, Wilson could make a temporary advance to pay off these two debts, estimated at £160, and that Donaldson would give security for this advance over the South Brisbane property. Mr. Cameron valued the property at about £200, and on the following morning (23rd) Wilson intimated to Thynne that the £160 could be had as soon as he liked. Wilson gave a cheque to Thynne for £82 6s. 2d. (Perkins & Co's. debt) on the 23rd, and gave a cheque to his solicitor, Bruce, for £77 18s. 10d. (Cribb and Foote's debt). On the 25th the bill of mortgage, dated the 24th March was executed. On the 24th March, Wilson paid Mort and Ricardo, a sum of £101, less 2½ per cent commission. At this time Wilson does not appear to have made up his mind whether or not he would accede to Thynne's proposal. On the 25th March, Wilson inspected Donaldson's business, and estimated it as worth from £1500 to £2000 per annum. On the 26th of March, Wilson met Donaldson, Bruce, and Thynne, at the latter's office, and then said that he would pay Donaldson's liabilities according to Thynne's memorandum, and the lawyers were to have the securities prepared as soon as possible, and he (Wilson) would pay through his solicitor. Wilson also said that he would provide Donaldson with cattle, and keep him going; but that if Donaldson did not keep steady he would wind him up. Donaldson went down on his knees and said he would not touch drink for twelve months. The cattle mortgage of the 29th March was executed, which assigned by way of mortgage all Donaldson's book debts, stock-in-trade, &c., to secure the sum of £160, then advanced, and a sum of £305 then due, making together the sum of £465. There was no contract set out in this deed that Wilson should make any further advances or carry Donaldson on. This deed, however, was alleged to have been irregularly drawn up by an inexperienced clerk in the absence of Mr. Bruce from illness. Oral evidence was given of the real nature of the transaction. On the 23rd April, a bill of mortgage of certain property in Ipswich (admitted to be the slaughter-house paddock) was executed by Donaldson to Wilson Bros., to secure to them the sum of £465, then or previously advanced, and all such further and other sum or sums of money as are now, or may hereafter be advanced by Wilson Bros. to Donaldson, with interest on the same at 9 per cent. There was a declaration in this bill of mortgage that it was collateral with the bill of mortgage of the 24th March, and with the cattle mortgage. It was admitted that the three deeds disposed of all Donaldson's available property by way of mortgage. On the 29th March, after the completion of the transaction, Wilson gave a cheque to Donaldson for £60 to pay for sheep, and on the

same date paid Landy Bros. for sheep, £19 10s. 10d. On the 12th April, Wilson paid Scott and Macgregor £153 2s., in pursuance of a previous promise. On 21st April, Wilson paid Ginn and Hooper £44 18s. 1d., and on 2nd May, paid Coleman £22 10s. These sums appear to have been included in Thynne's memorandum, as other liabilities, £100, and were paid accordingly. The only other advance for sheep appears to have been on 1st April, £71 16s. 6d. Donaldson became unsteady and absented himself from his business, and on the 7th April, Wilson took possession and continued to carry on till 30th April, when all Donaldson's property, covered by the securities, was sold and realised as follows:—The South Brisbane property, £233 3s. 3d.; the whole of the butchering business and the paddock, £1025; and £19 5s. 2d., on account of pigs sold. It further appeared that Mr. Wilson paid to the Bank of Australasia £181 8s. in order to obtain a transfer from them to Donaldson, of the slaughter-house paddock. Donaldson was adjudicated insolvent on the 6th June on the petition of a judgment creditor for £500; there were two other creditors for small amounts. In Thynne's memorandum the Grampian Hills property is set down as an asset paid £500, '3000 acres of land at 18s.; balance due, £2740.' Neither Thynne nor Wilson knew anything to the contrary until the 1st April. In point of fact, Donaldson had given a cheque for £500, which was dishonoured in January. Wilson, on the 26th March, refused to have anything to do with the Grampian Hills property, as he said he thought the only security that could be given over it would be a second mortgage; that he did not see how he could find a security on it. It was attempted to be shown that Wilson was told of the dishonour of this cheque by Mr. M'Gregor on the 23rd March, but it is clear that Mr. M'Gregor was in error as to the date. Both Thynne and Wilson fully believed that Thynne's memorandum contained a statement of all Donaldson's liabilities. Mr. Griffith contended that at the time these transactions took place Donaldson was insolvent within the meaning of the *Insolvency Act of 1874*, and that Wilson knew it, and that the property assigned was substantially the whole of Donaldson's property, and amounted to a fraudulent preference of some of his creditors to the others. He cited the following cases:—*Ex parte Fisher, L.R., 7 Ch., 636; Ex parte Dawn, 17 Ch. Div. 26; Tomkins v. Saffery; In re Cook, 3 App. Cases, pp. 213 and 555*; *Ex parte Zwilchenbart, 3 Mont. Dea and De Gex, 671; Leake v. Young, 5 E. & B., 965.* The Attorney-General (Pope Cooper) submitted that the securities, although in part inaccurate, nevertheless when taken with the evidence adduced by Wilson and Thynne, are, after a careful examination, valid, and that the various payments made by Wilson Bros. were paid in good faith to enable Donaldson to carry on and without any knowledge or notice at any time of any fraudulent preference under section 106, of the *Insolvency Act of 1874*; that section 109 only changes the onus of proof, and the respondents have proved that the securities were made in good faith on the part of the respondents, and that they were protected by subsection 3 of section 12 of the Act. He cited *Ex parte Ellis, In re Ellis, 2 Ch. Div., 797; Ex parte Winder, 1 Ch. Div., 290 and 560; De Gex's Bankruptcy Reports, 273 and 290.* With regard to the mortgage of the 23rd March, I am of opinion that the advance of £168 to pay off Perkins and Co. and Cribb and Foote's debts was made solely on the security of that bill of mortgage. At that time Mr. Wilson had not promised to pay off Donaldson's liabilities and carry him on, and, moreover, this advance was not made until Wilson had obtained Cameron's valuation, which was about £200. Moreover, this South Brisbane property had (as I apprehend) nothing to do with Donaldson's butchering business. I think, therefore, that this mortgage must be upheld, and that Wilson is entitled to retain, out of the amount realised by the sale—namely, £233 3s. 3d., the money advanced, £160, and 9 per cent interest on that amount up to date of sale, together with costs and expenses attending the sale, and the

balance must be paid over by him to the Official Trustee. I think the entire evidence—documentary and oral—shows clearly that the intention of the parties on the 25th March was, that in order to enable Donaldson to carry on his business (which Wilson believed to be a paying one) Wilson made the promise (which was verbal) to pay off Donaldson's liabilities and carry him on, and Donaldson gave the securities. Wilson Bros. paid off the liabilities, and up to the time of taking possession they appear to have made the following advances to Donaldson for the purchase of sheep to enable him to carry on the business, namely:—29th March, £19 10s. 10d.; 29th March, £60; 1st April, £71 16s. 6d. Wilson Bros., in consequence of Donaldson's behaviour, were compelled to take possession on the 7th April, and continued in possession, carrying on the business until the 30th April, the date of the sale. I may here remark that, according to the evidence of G. Wilson, Donaldson was doing a good business, and if he had kept sober he would have made a fortune. Moreover, Wilson himself fully believed the business to be a paying one. In *Ex parte Ellis; In re Ellis, 2 Ch. Div., 798*, Mr. Justice Mellish says, 'the result of the authorities is that where a debtor assigns his whole property as a security for a past debt only it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance it is not a question whether the further advance is great or small, but whether there was a *bonâ fide* intention to carry on business.' James, L.J., says—that 'it was clear from the evidence that the transaction was *bonâ fide*. It was the intention of both parties that the bankrupt should go on with his business, and that if he behaved well he should receive further help.' I am of opinion that the whole evidence shows that the transaction was entered into by both parties with the sole intention of enabling Donaldson to carry on his business, which he could have done successfully if he had behaved himself and attended to it I may add that the cases of *Ex parte Winder, In re Winstanley, 1 Ch. Div., 290* and the case of *Ex parte Chester, In re Dungate*, reported in a note at page 293, seem to me to shew that a contemporaneous parol agreement such as Wilson Bros. made in this case, coupled with further advances actually made, would be sufficient to support the deeds. I declare that Wilson Bros. are entitled to retain out of the proceeds of sale of South Brisbane property £160, with interest at 9 per cent to date of sale, together with costs of sale, and that they pay over the balance to the Official Trustee. And further, I declare the deeds of the 29th March and the 23rd April to be good and valid. The costs will be allowed to the respondents.

From this judgment the Official Trustee appealed.

The appeal was heard on the 9th, 11th, and 13th of November.

Griffith, Q.C., Real & Lilley, for the appellant, (the trustee).

Cooper, A.G., & Murray-Prior, for the respondent (Wilson Bros).

Griffith, Q.C., deduced his arguments from these propositions:—

1st. A verbal arrangement of the kind made here not legally binding on the mortgagees will not support the mortgages.

2nd. A mere agreement for future advances, even if binding, is not sufficient under our statute.

3rd. The real arrangement was an assignment of the whole of the debtor's property to pay particular creditors, or all the creditors, and in either event this is an act of insolvency. The transaction amounts to a *cessio bonorum*.

He cited *Ex parte Dawn, 17 Ch. D., 26; Ex parte Winder, 1 Ch. D., 290; Ex parte Foxley, L.R., 5 Ch., 515; Butcher v. Eastowe, 1 Doug. 295; Insolvency Act 1874, s. 44 (1 & 2), s. 108; Ex parte Zwilchenbart, 3 M.D. & D., 671;* also on appeal, *De Gex, 273; Leake v. Young, 5 E. & B., 955.* To explain the meaning *bonâ fides* under the Act, *Ex parte Saffery, 4 Ch. D., 555;* on appeal, *3 App. Cases, 213, 224; Ex parte*

Fisher, *L.R.*, *7 Ch.*, *636*; *Linden v. Sharp*, *6 M. & G.*, *895*.

Real followed, and cited *Clifford v. Turrell*, *9 Jur. 633*, and *Liefchild's Case*, *L.R.*, *1 Eq.*, *231*, on the question of the admissibility of parol evidence, to prove the real consideration of the securities. He also referred to some of the cases above.

Cooper, *A.G*, submitted that there was a reasonable and sufficient consideration given at the time. The bill of sale and securities were executed *bonâ fide* with the view of enabling Donaldson to carry on his business, and therefore there was no act of bankruptcy. There was a contemporaneous parol agreement to make further advances, and thus enable the insolvent to carry on his trade, and substantial advances were in fact made. This is sufficient to support the securities. He cited *Hutton v. Crutwell*, *1 E. & B.*, *15*; *Ex parte Winder*, *1 Ch. D.*, *290*; *Ex parte Dawn*, *17 Ch. D.*, *26*; *In re Ellis*, *2 Ch. D.*, *797*; *In re King*, *2 Ch. D.*, *256*; *Insolvency Act 1874. ss. 108, 109, 112, & 113*; and commented at length on *Tomkins v. Saffery*, *3 App. Cases*, *213*.

Murray-Prior followed, and cited *In re Coleman*, *L.R.*, *1 Ch.*, *128*; *Lomax v. Burton*, *L.R*, *6 C.P.*, *107*, *114*; *Ex parte Reid*, *L.R.*, *14 Eq.*, *593*; *Bittlestone v. Cook*, *6 E. & B.*, *296*; *Pennell v. Reynolds*, *11 C.B. (N.S.) 709*; *Ex parte Butcher*, *L.R.*, *9 Ch.*, *598*; *7 H.L.*, *839*; *Ex parte Kevan*, *L.R.*, *9 Ch.*, *754*.

Griffith, *Q.C.*, in reply.

On the 5th December, judgment was delivered as follows:—

LILLEY, C.J.:—This is a motion calling upon Messrs. Wilson & Co. to show cause why three deeds of incumbrance should not be set aside on the ground that they are to be considered fraudulent within our colonial insolvency law. The general law of insolvency in this colony is practically the same as in England. It is founded upon two or three principles which have been declared by the court from time to time, and are perfectly clear to all lawyers. If a man strips himself entirely of his property, and so puts an end to the possibility of trading or of dealing with the moneys of his estate, so that he can not pay his way, or if he makes provision by any means for the distribution of his estate among his creditors, in any other way than under the sanction of the insolvency law and the courts, he commits an act of insolvency, and the transaction, if between him and a creditor, certainly, or between any other person in fact, would be deemed to be fraudulent. Two exceptions, which are in principle practically one, have been engrafted upon these general rules or principles. If a man excepts from the grant such proportion of his property as would enable him to pay his creditors, the transaction would not be deemed fraudulent, or if he receives at the time of the transaction anything in the nature of a fair equivalent it would not be deemed fraudulent. The fair equivalent would be in the nature of an exception and stand upon the same footing as a substantial exception from a general grant, and it may be applied in the same way as that of a reservation. It may be used in carrying on his trade or discharging his liabilities, but a man must not enter into any transaction which will deprive him of the means of meeting his liabilities, or, if he is unable to meet them, withdraw his assets from the operation of the law of insolvency, from that form of administration which the law has provided for the effects of persons who are unable to meet their engagements. That is the general law. There are three instruments sought to be impeached; the first is a bill of mortgage for £160 of the 24th March, given by Donaldson to Messrs. Wilson; the second is a bill of sale of the 29th March between the same parties; and the third is a bill of mortgage of the 23rd April between the same parties. With regard to the bill of mortgage of the 23rd April it is a collateral security, and its fate will depend upon the conclusion we come to with regard to the bill of sale of the 29th March, which is the principal instrument, and towards which nearly all the

arguments were directed. The bill of sale of the 29th March, which I call the principal instrument, looked at by itself without any other evidence to support it, undoubtedly falls within the general rules, and must be considered fraudulent. It is an instrument which recites that Donaldson, the insolvent, is indebted to various creditors, and also to Messrs. Wilson in the sum of £805; it then proceeds to give security to the Messrs. Wilson for the sum of £465; that £465 includes also a sum of £160, which was lent on the mortgage of the 24th March preceding. The instrument then is one which makes provision for the securing the payment to Messrs. Wilson of an antecedent debt; it would be, in fact, a preference of the Messrs. Wilson against the creditors, whose existence is recited in the instrument itself, so that the deed would be an act of insolvency. It would hinder and delay the other creditors if we judge only by the instrument itself. But the parties were permitted to give evidence in support of the deed, the evidence being directed to show that the recitals did not set out the true nature of the transaction, but that the Messrs. Wilson had given a sufficient consideration for the conveyance of the property, which rendered the instrument free from taint under our insolvency law. If that is so then they would be entitled to have the transaction upheld. Now, our insolvency law, whilst it upholds the general principle of the English law on the subject, has in one section of our Act made the local law somewhat more stringent. There is nothing in the English Act, that I can find, like the 108th section of our Insolvency Act of 1874. If this case had depended upon the 107th or the 109th sections of our Act, which are similar to the English law with some exceptions not important in this matter, the transaction might be held, and, I think, it is hardly disputed that it would have been a *bonâ fide* transaction and for valuable consideration. But our 108th section requires something more, I think, than *bonâ fides*, it requires that the consideration shall not only be valuable, but that it shall be reasonable and sufficient and that it shall be given at the time the instrument is executed, &c. I think it will be convenient and render my deliverance more intelligible if I give a short *resumé* of the facts. Early in March, 1881, Donaldson was carrying on business in Ipswich, he dishonored a promissory note for £805 which he had given to Wilson Bros. They do not appear to have been pressing him, nor to have been urgent creditors, the reason probably being that they had been agents for his affairs from the preceding December and had the most perfect confidence in the solvency of his business, and, therefore, felt no uneasiness as to the ultimate payment by Donaldson. But the dishonor of the promissory note in March was evidence that he was insolvent, because insolvency as it has been again and again defined in this court, and as also laid down in the English courts by the highest authorities, means inability to meet your engagements as they become due. A man may have a million pounds worth of property as against a bill falling due of £805, but if he has not the money ready to meet the bill he is insolvent in point af law, although perfectly solvent in point of reason. But as a matter of business convenience, where a man fails to meet his engagements as they become due, the creditor may appeal to the insolvency law for a remedy and the distribution of his effects, although as to the ultimate result of the insolvency the large possession would be more than adequate to meet all demands upon it. Well, then, later on in March Donaldson was sued by a creditor, another evidence of insolvency in law; and he was contemplating insolvency because feeling irritated with being served with process in a public place, he consulted Mr. Thynne and submitted to him a statement of his affairs and was making arrangements to become insolvent. Under these circumstances, Mr. Thynne, thinking him in anger and unreasonable, and his statement of affairs showing a large surplus and a valuable estate, and the business being a good one yielding something like from £1000 to £2000 a year, and thinking he was only insolvent in contemplation

of law, for assuming that statement to be true he would be able to pay his debts twice over, Mr. Thynne applied to the Messrs. Wilson. Now there is no doubt, it has not been attempted in fact, to raise any reasonable doubt that the Messrs. Wilson entered into and carried out this transaction, whatever its character in law, in perfect good faith, and that they placed themselves in a position which they need not have put themselves in, if the transaction had not been entered into in perfect good faith and entire honesty. Mr. Thynne applied to the Messrs. Wilson, and the obligation was undertaken on their part; although I am bound to say it was an imperfect one that could not be sued upon at law but still it was an honorable obligation on their part. Now as to the instruments themselves. This case, as it seems to me, depends for its determination upon the view we take of the circumstances as applied to the 108th section of the Act of 1874. The whole case seems to me to hang upon that section. If it had depended upon the other sections 107 or 109, or upon the general insolvency law, I should have no hesitation in coming to a conclusion favorable to Messrs. Wilson. But this case involves some delicate consideration, particularly the points ably argued on behalf of the creditor who instructed Mr. Griffith and sufficiently on the part of those instructed by the Messrs. Wilson. Was every one of these instruments given for a reasonable and sufficient consideration? I will first consider them separately. It had been conceded that the bill of mortgage of the 24th March for £160 might be considered as a separate transaction. Mr. Justice Pring found that it was and I shall consider it as a separate transaction. The first was the bill of mortgage of the 24th March for £160. That was a mortgage, and it is not possible to say that the mortgage for £160 is not good for £160, so to that extent the instrument is good. But I think it is probable it may be held to be and, I think, can be held to be relative to the antecedent debt, a reasonable and sufficient consideration, for the land after all only realised £288, deducting expenses it would probably not be worth more than £200. So that I think that deed standing by itself as a mortgage transaction must be held to be a deed given for a reasonable and sufficient consideration given at the time, and if that stood alone, as I hold that it was given for a reasonable and sufficient consideration, given at the time, it would be a valid transaction. Section 108, not only requires that the consideration should be reasonable and sufficient, but that it should be given at the time of the transaction. My view is not that the money need be given on the instant, but that the transaction should be contemporaneous; if there was a long interval I should hold that it was a consideration not given at the time. I think we must interpret the section by the course of business which takes place in daily life; therefore, I read *at the time* as contemporaneous, not necessarily on the instant. It may be given on the day before, or on the morning or evening of the day, or possibly a week or fortnight after, and still be given at the time within the meaning of the statute. But I should not be disposed to give a very extensive latitude to this interpretation of the statute, I think it better that it should be construed as nearly and as practically to the words of the statute as possible. I have said that the principal instrument is the bill of sale of the 29th March, the bill of mortgage will stand or fall by our dealing with the bill of sale. The bill of sale of the 29th March, in so far as it merely secured an antecedent debt, I have said would be bad within the meaning of the insolvency law, but the consideration which the Messrs. Wilson have set up in support of the deed was of a nature which would bring it within one of the saving exceptions which I have indicated, namely, that it was given for a fair equivalent, or in our law, for a reasonable and sufficient consideration given at the time of the transaction. So that although the deed would be bad under the general insolvency law, it may be sufficient if it can be brought within one of the exceptions indicated if either a substantial reservation, or if a fair

equivalent were given for the cession. I think the evidence to support that consideration was properly admitted. The consideration is said to be this—When the statement of Donaldson's affairs was submitted to Robert Wilson on behalf of his firm, it appeared that they were required to pay the existing debts of Donaldson, and to provide means for carrying on the business. It seems to me, although the obligation was imperfect, they undertook honorably to discharge his debts, and took upon themselves the burden of his affairs. They gave evidence of that by paying a very substantial portion of his existing debts on the very day the instrument was executed. They paid over £360, I take off the £160 previously paid to creditors, between the 23rd and the 29th March. In fact, taking from the 23rd to the 29th March, and putting the two deeds together, as we may do, and probably ought to do, it was all one transaction, they actually discharged liabilities to the amount of £529 4s. 7d. irrespective of their own debt. The whole of the effects under the mortgage of the 24th of March, realised £1,277 8s. 5d., treating the business as a going concern. They paid more than that. I am disposed myself, and I think, rightly, to regard one or two of the subsequent payments as within the consideration. If we add £153 2s. that will make £682 6s. 7d. which they paid at or about the time of the execution of these two instruments of the 24th and 29th March. Now their own antecedent debt was only £305, so that they increased the obligation of the insolvent to them by two-thirds, he became their debtor for over £1,000, instead of £305. I am including the cash advance, £60, in that sum, but they proposed to do more than that, they proposed to carry him on, and if he had been a man who had any control over himself, control merely to the extent of looking after his business, I think, they did enough for him to carry on his business; not only did they discharge all the debts according to the statement laid before them, but they proposed to make further advances and carry out the obligation. Was that a fair equivalent, or, in the language of our statute, was it a reasonable and sufficient consideration for what they got, that is, security for their past debt. There is one creditor for £500 represented by Mr. Griffith, who says, nothing has been done for him, that he is left out in the cold, but that is always the case in matters of this kind. His name appeared in the statement of affairs submitted to Wilson when considering the matter, but it appeared with the letters P.D. (paid) against it, so that the Messrs. Wilson entered into the transaction in perfect good faith, believing that the debts paid were all Donaldson's liabilities. I have come to the conclusion, looking at the deed either as a separate transaction, or as is the inclination of my judgment, that it was all one transaction; though the transaction of the 24th March may be regarded as a distinct transaction, still I am inclined to think that I do no violence to the truth in regarding the transactions upon these deeds as substantially one, I think, there was a reasonabe and sufficient consideration given, as it appears to me that it was, *bonâ fide*, a real honest attempt made to carry this man on and to discharge all his liabilities. They did not press him for the debt owing to them, they made further advances, until he began drinking, and seeing that it was utterly hopeless to expect any change in him they were compelled to take possession and sell. It was contended by Mr. Griffith, that although some of this money might be within the consideration that as to the payments made after they took possession and sold they must be held responsible. I think not. I think they were payments *bonâ fide*, made without any notice of the act of insolvency, and that they must be held valid.

The motion was dismissed with costs.

HARDING, J.:—So far as the facts are concerned they have been sufficiently stated by The Chief Justice. The application is an application by the trustee in the insolvent estate of Donaldson, to set aside securities made by him in favor of the Messrs. Wilson Bros. within six months of the presentation of a petition of insolvency against him. The case was argued by Mr. Griffith for the

trustee, and it was contended by him that the securities were void under the general principles of the insolvency law—as being an assignment of the whole of the debtor's property for the benefit of all, or some of his creditors, as being such an assignment to secure a past debt without a sufficient equivalent given at the time, or an assignment void under the 108th section of our Act which is different to the English insolvency law. If the transaction will stand under the 108th section, I think the grounds which will support it thereunder, will be also sufficient—in this case—to maintain it against the other arguments. Under the 108th section, Mr. Griffith argued that: (1). A verbal agreement of this kind not legally binding on the mortgagee will not support the securities. (2.) That a mere agreement for further advances, even if binding, is not sufficient. In this case, as far as the facts go, I have formed the opinion that at the time of the execution of this mortgage there existed no binding agreement to make subsequent advances to any extent whatever. A mortgagee in advancing monies to his mortgagor frequently covenants to make certain further advances, limited in amount; it would, therefore, be nothing extraordinary to find an agreement of that kind here. An honorable understanding on the part of the Messrs. Wilson that they would make further advances possibly existed, but I cannot say that I think that anything less than a binding legal agreement could be weighed in arriving at the conclusion whether a reasonable and sufficient consideration had been given at the time under the 108th section. However honorable then, unless there was a binding legal agreement, the transaction so far as it depends on this must fall Under the 108th section the transaction is to be void if a petition for adjudication be presented against such debtor within six months. The law says it is to be void during the whole six months if a petition for adjudication is presented. Now, if an honorable understanding would support the transaction if carried out, the following anomaly would result. The validity of the securities would depend upon the circumstance whether or not the honorable understanding had or had not been carried out before the petition was presented, since, if the petition was presented before it was possible to carry it out, nothing would have been done in pursuance of such understanding, and the securities would be void, whereas, if the presentation of the petition was later and something had thereupon been done in pursuance of the undertaking, the securities would be valid, in which case the validity of the securities would depend upon some act done after the time of the making of the securities, and which the party doing it was not bound to do. Hence if there was a verbal arrangement not amounting to a legal binding agreement on the mortgagee to make further advances, I do not think it could be accounted as a reasonable and sufficient consideration given at the time, in whole or part; if there was a legal binding agreement, I think it could be weighed as part of the consideration. I have already said that there was no such binding legal agreement, therefore, I throw that out of my consideration and proceed to consider whether, other than this, there was a reasonable and a sufficient consideration given at the time. The negotiations for these mortgages commenced on the 22nd March, and were so far matured that, by the 23rd, the Messrs. Wilson had ascertained the value of certain freehold property, and that it would justify them in making an advance in cash to the extent of £200, and had thereupon informed Mr. Thynne, the insolvent's solicitor, that they must have further time to consider whether they would take up the whole matter, but that they were satisfied that they could go to the extent of the £160 at once on the security of these freeholds, and, as I hold it, as preliminary to going to the whole extent they advanced on the 23rd March, £82 6s. 2d., part of the £160, to pay a pressing creditor (Perkins & Co.), and on the 24th March, the insolvent executed the mortgage to secure the £160, the balance of which, £77 13s. 10d., was to be paid by Messrs. Wilson to Cribb & Foote, which they subsequently did pay. On the

29th March, these negotiations still went on, the insolvent Donaldson all the time offering the security which he ultimately gave, if Wilson Bros. made certain advances, and that in addition to the advances then made they should have security for the amount of the dishonored bill for £305 which Donaldson then owed them. Under these circumstances Wilson Bros. on the 23rd paid Mort & Ricardo on behalf of the insolvent, £101 5s.; Landy Bros. £19 10s. 10d.; and on the 29th, they gave the insolvent £60 in cash, and paid Ivory £188 8s. 9d., making in all £529 4s. 7d. On that 29th March, as security for these advances, Donaldson executed a bill of mortgage in their favor of all the properties not included in the previous bill of mortgage, and subsequently in April a bill of mortgage under the Real Property Act was actually executed. But I consider that stands or falls, and is as good as the bill of sale of the 29th March, although it was not executed till some time after as the property was bound in Equity by the bill of sale. So that on the 29th March, when the bill of sale was executed, Wilson Bros. had advanced in all a sum of £529 4s. 7d. Subsequent to this and in pursuance of the honorable understanding to make further advances or to pay these debts, but for which I can find no binding agreement, they paid Scott & McGregor £153 2s.; Ginn & Hooper, £44 13s. 1d.; and Coleman, £22 10s., making together £220 5s. 1d., but I do not think these sums can be considered as forming part of the reasonable or sufficient consideration given at the time of the execution of the mortgage. To my mind there was nothing legally binding upon them to make these payments. Therefore, what I have is this, a sum of £529 4s. 7d. advanced as a present advance and for which the insolvent gave security, and for the past advance of £305. Now the question is, is that sum of £529 4s. 7d. considered in connection with the amount of the value of the property given as security, and the amount of the first debt to be secured, a sufficiently reasonable and sufficient consideration given at the time to support a security for the advance of £305. It is more than equal to it, it is nearly half as much again. Considering the amounts which in the cases cited have been held sufficient to support the transaction, and which in many cases was much less than this, I think when as much as the debt and nearly half as much more is given, it is a reasonable and sufficient consideration given at the time, and that consequently the deeds must stand. Then as to these sums, amounting to £220 5s. 1d., made subsequently. The bill of sale provides for not only "securing the sum then advanced, but further advances made during the continuance of this security." These payments were made prior to any notice of any act of insolvency or anything else which to my mind render them void, consequently they stand as secured under the mortgage as further advances made after its execution. Then it was argued that the sum of £150 paid on the 8th June to Thynne for Donaldson by Wilson Bros. should be ordered to be paid to the trustee, on the ground that it was paid after Wilson Bros. had notice of the act of insolvency by Donaldson; the act of insolvency relied on was the execution of these securities, this had failed, the only other brought to our notice is the act of insolvency charged in the petition which was presented on the 30th June 1881; it was that Donaldson, with intent to defeat or delay his creditors, departed from his dwelling-house and otherwise absented himself. I do not know, and I cannot find on the evidence, that Wilson Bros. had any notice before the adjudication that Donaldson had departed from his dwelling-house with that object, it is not brought home to them by the evidence. Before the adjudication we have nothing to bring the act of insolvency home to Wilson Bros. Then compare the dates, the petition is presented on the 30th June, the adjudication is on the 6th July, payment is made on the 8th, consequently that payment will not have to be refunded by Wilson Bros.; the other sum of £91 16s. 7d., the balance, has been given to the trustee. The result of my judgment is, that the trustee will take nothing

by his motion, and that the appeal must be dismissed with costs.

PRING, J.:—This is an appeal from a judgment of mine delivered in this court on the 1st November last. The case came on for hearing before me under the section of the Act of 1874, which enabled me to sit and try the facts as a jury, and to apply the law to them. Mr. Griffith sought to impeach these three deeds under the 108th and 109th sections of *The Insolvency Act of 1874*, but curiously enough the principal cases quoted before me and the Full Court were cases decided under the 92nd section of the English Bankruptcy Act of 1869, which for the purposes of this case is identical with our Act of 1874, section 107, so that those cases would have been applicable to that section, but not a word was said about that section before me. The Attorney-General pursued the same course. In the cases of *Miskin v. Evans*, and *Pickering v. Fegan*, in which Mr. Justice Lutwyche decided that a reasonable and sufficient consideration is a fair equivalent given at the time for the assignment, judgment was delivered on the construction of the 74th section of the Act of 1864, which is nearly identical with the 108th section of the Act of 1874. In dealing with this case and following the argument I must confess I took into consideration the nature of the transaction, and looked upon it as a fair commercial transaction in which the creditor upon the application of the debtor agreed to pay his liabilities and to make advances to enable him to carry on his business, and that has always been a case recognised by the English authorities, where the transaction was *bonâ fide* and the intention honest. And I considered the honest intention and the *bonâ fides* ought also to be taken into consideration in this case as material in deciding the reasonableness and sufficiency of the consideration. There appears to be a little difference of opinion between The Chief Justice and Mr. Justice Harding, as to the nature of the consideration. If questioned, I should coincide with the judgment of The Chief Justice.

Appeal dismissed with costs.

Solicitor for Official Trustee, *O'Sullivan*, Ipswich.

Solicitors for Wilson Bros., *Hart, Mein & Flower.*

December 8th, 1882.

IN THE MATTER OF FREDERICK FF. SWANWICK, *ex parte* BULCOCK AND ELLIS.

Disbarment of Counsel.

THIS was a motion to make absolute a rule *nisi* calling upon Frederick ffoulkes Swanwick, a legal practitioner, to show cause why he should not be disbarred and his name struck off the roll of barristers, for misconduct alleged against him on certain affidavits of Robert Bulcock, Moses Ward, and John Thomas Ellis.

Griffith, Q.C., appeared to move the rule absolute; and *Power*, with whom was *E. Lilley*, to show cause on behalf of the respondent.

Argument was heard on the previous Thursday.

LILLEY, C.J., in delivering the judgment of the court said: In this case a rule was obtained calling upon a legal practitioner, *Swanwick*, to show cause why he should not be disbarred and struck off the rolls for certain misconduct set out in certain affidavits to which his attention was called. The accusation was in fact that, not being instructed by Mr. Ellis, he had appeared at the revision court, had stated that he was so instructed, and had claimed costs on the dismissal of an objection to Mr. Ellis's name. That was an accusation of the very gravest kind that could be possibly be made against a practitioner, being one of fraud committed upon a court engaged in one of the functions entrusted to it by the legislature—the revision of the electoral roll. He has filed an affidavit of his own, and one of William Thorne, who was one of the presiding justices on that occasion, in answer to the charge. The fraud being of a very serious character we must be perfectly satisfied that it has been committed before we proceed to such a severe measure as that of striking a legal practitioner off the roll and disbarring him. We think, looking at the whole of the matter before us—at the affidavits to which alone we make any reference—that it is

probable he believed on that occasion that his instructions from the political agent, Mr. Farry, justified him in making the claim for costs. We think the proof given of that circumstance takes the sting out of the matter, and that we should not be justified in holding him guilty of the fraud charged against him in this rule. We therefore, dismiss the rule.

Power: Will your Honors discharge the rule with costs?

LILLEY, C.J.: We discharge the rule, Mr. Power.

Solicitors for Bulcock & others, *Smith & Smith.*

IN THE MATTER OF FREDERICK FF. SWANWICK, *ex parte* BAIN.

Legal Practitioner — Disbarment — Striking off the roll.

To write a letter threatening criminal proceedings unless certain costs and charges are paid, is such misconduct in a practitioner as requires the exercise of the penal jurisdiction of the court over him by means of disbarment and striking him off the roll.

THIS was a motion to make absolute a rule *nisi*, calling on Frederick ffoulkes Swanwick to show cause why he should not be disbarred and struck off the roll for his conduct in reference to a letter written to John Bain, of Edward-street, grocer, and signed by the respondent. The facts appear sufficiently from the judgment.

The Attorney-General had moved the rule absolute on the previous Thursday.

LILLEY, C.J., in delivering the judgment of the court, said:—In this matter an application was made in the first instance, calling upon the practitioner to answer the matter of certain affidavits. Upon the hearing of that, and when affidavits in reply had been filed, we ordered a rule *nisi* to issue calling upon the practitioner to show cause why he should not be disbarred and struck off the roll. The court, as I have had occasion to say previously when administering an admonition of the court to this same practitioner, Mr. Swanwick, has full jurisdiction over all its ministers and agents to keep them within the law. The Supreme Court is the arm of the law. It is in fact the embodiment of the legislative will of the country, entrusted with the administration of the law of the colony, and for that purpose invested with most extensive and important functions. It is clear, of course, that the judges of the Supreme Court themselves cannot carry out all the behests of the legislature. They must depute to ministers and agents the setting of the law in motion for the purpose of carrying out the procedure of the court and the execution of its judgments when pronounced. It is essential that the court itself should be constituted of men of the highest honor, and it is not less essential that the inferior agents and ministers of the court should also be men of the highest probity and honor. It is only by securing such men in the administration of justice that the court can hope to make its functions beneficial to the public. If we do not insist upon the most scrupulous honor amongst the members of the bar, and throughout the whole body of attorneys and solicitors of the court, we know well by experience that we shall expose the public to malpractices of the most oppressive and unjust character. It is needful, therefore, that the control which the court has over its officers should be exercised with the greatest possible strictness, doing no injustice to the practitioner whose conduct may be complained of, but insisting on every occasion when complaint is made that he shall clear himself from all taint of dishonor, and stand clear before the court and the public. The powers of the court are great, and among the less instructed portions of the community, the person of a barrister or an attorney, or legal practitioner, is invested with some dim idea of great power, and I believe, looking at the conduct of the general body of practitioners, that they also accept any act of his as one which he is lawfully authorised to do. It is possible and probable, therefore, that many oppressions may be carried out by ministers of the court and not be complained of, simply because those upon whom they are inflicted are ignorant not only of the power of the court to restrain its ministers within the law, but

of its determination to do so when any complaint is made against them. The complaint in this case is that the practitioner, Mr. Swanwick, by a letter containing a threat, demanded from the complainant, Bain, certain costs and charges. The letter is in these terms:—"I have the honor to inform you that a Mrs. Sheehan, from the Pine River, has waited upon me with a sample of flour and an analysis thereof by a competent man, which analysis shows that the flour is unfit for human use. The flour was obtained from you. Unless all the costs and charges incident thereto are forthwith paid into this office by you I shall proceed, under the recently passed Act, to wit, *The Adulteration of Food and Drugs Act*, to prosecute you and advertise you throughout the colony. This matter will stand open till 10 o'clock next Saturday forenoon and no longer." Now it is admitted that that letter is signed by Mr. Swanwick himself, and the answer or explanation which he gives of it is this:—In the first place he says he never read it, that he signed it believing it to be all right; and in the next place he says, adverting no doubt to the section of the Larceny Act to which I drew his attention, that it was despatched on reasonable and probable grounds, that is, that he had reasonable and probable cause for making the demand which he did upon Mr. Bain. I have said that, in shaping his defence in the way he has done, he has adverted to the section of the Larceny Act to which I drew his attention when the rule *nisi* was granted. My object in doing so was to show him how closely he had run to the commission of a felony. I do not wish it to be understood that I am now, or that the court is now in any way judging the question of his guilt or innocence of the statutory offence. It is not essential to the exercise of the jurisdiction of the court that the misconduct of one of its practitioners should be a statutory misdemeanour or felony, before the jurisdiction of the court can be exercised against him or over him. There are many instances of misconduct on the part of officers of the court visited by severe punishment when the misconduct would not be amenable to the jurisdiction of the criminal courts. We exercise control over the honor of the profession, and it is not essential to the exercise of our jurisdiction that a practitioner should have been guilty of a statutory offence; it is enough, if in the judgment of the court he has been guilty of such conduct as renders him unfit to remain upon the roll of the court—to be entrusted, in fact, with the power of the court which he can set in motion in certain particulars at any moment. The legislature has granted to practitioners a monopoly. They must be qualified by character and attainments to appear in this court, and in any of the courts of the colony. From this court they receive their authority to appear for persons in all courts of the colony, and if they are not persons of good fame and character they cannot obtain admission to the profession if their real character be known to the court. And so if they do not after admission continue in a course of honorable conduct, such conduct as in the opinion of the court justifies us in leaving in their hands the authority committed to them as our officers or agents, the court will take steps to remove them from their office, not on its own motion but on complaint made to the court and justified by evidence. If the misconduct be committed in the face of the court, before the court itself, then of course the court will of its own motion exercise its jurisdiction; but I am speaking now of misconduct said to have been committed outside the walls of this court. Now, the section of the statute to which I adverted when the rule *nisi* was granted, and to which the practitioner has directed his defence, is the 49th section of the Larceny Act. I mention it again for the purpose of showing how nearly to a breach of this provision he has been betrayed into:—"Whosoever shall send or deliver or utter or directly or indirectly cause to be received knowing the contents thereof any letter or writing demanding of any person with any menaces and without any reasonable or probable cause any property money &c. or other valuable thing shall be guilty of a felony." I wish to correct a misapprehension which seems to have entered the mind of Mr. Swanwick as to the construction of

this section of the Act. There must be knowledge no doubt. A man cannot commit an offence unknowingly under this statute. The statute itself requires that there shall be knowledge of the contents of the letter, and the letter must be written without any reasonable or probable cause. Here the misapprehension of Mr. Swanwick seems to have arisen. It is not sufficient for him to prove or attempt to prove in the absence of Mr. Bain that the latter had been guilty of an infringement of the Sale of Food and Drugs Act. The reasonable and probable cause here means reasonable and probable cause justifying Mr. Swanwick in asking for the money. That is the reasonable and probable cause, which must exist before money can be demanded by any letter. If we were to construe this section as showing that Mr. Swanwick had reasonable and probable cause, we must admit that he was at liberty to condemn Mr. Bain behind his back, and exact from him costs which can only be obtained from a bench of magistrates—a court of justice condemning Mr. Bain. But we are sitting in judgment to-day, not upon the question whether he has or has not been guilty of the statutory offence, but whether his conduct has been such as requires the exercise of the penal jurisdiction of the court over him, by means of disbarment and striking him off the roll. We think that this letter was unjustifiable, that it was a menacing letter, and one which he had no shadow of right for issuing from his office when he did so. The Sale of Food and Drugs Act was in full operation when this letter was written and the true course for any one aggrieved was to appeal to a court of justice under the provisions of that statute. This letter, therefore, was a menacing letter, containing a threat of prosecution signed and despatched by Mr. Swanwick from his office. It was, therefore, an act of grave misconduct on the part of an officer or minister of this court. His true course of duty was to have caused the prosecution of Mr. Bain, or, if he chose to abstain from taking that course, to have left the matter alone. It is observable, too, that this letter contains no mention of the claim made upon Mr. Bain. That is left to the imagination of the man from whom it is demanded. When he had seen Mr. Swanwick the demand might be for a great or small amount such as the state of mind of the man from whom it was demanded might raise the cupidity of the person claiming it from him up to. There is no saying to what amount it might have been raised if his state of fear had been sufficient to justify a large demand. The letter is not one that a respectable practitioner of this court, an honorable man, would despatch from his chambers, and it would be to sanction an intolerable form of oppression if we were not to visit it with severe punishment. Mr. Swanwick has claimed that we should not condemn him in this matter without giving him an opportunity of being tried by his peers—by a jury of his country. If the oppressions and exactions of disreputable and dishonorable members of the profession were to go on until some person would take the risk of bringing an offender before a jury, they might exist for a long time, and the courts and the profession would become objects of scorn to the general public. There is no such law. We deal with our officers upon our own responsibility, and we intend to do so. The highest court of appeal from this court has decided that in dealing with the misconduct of its officers the jurisdiction of the court is not stayed until a jury have found a verdict one way or the other. *(Bunny v. The Judges of New Zealand, 15 Moore's P.C.)* I have said that the letter was unjustifiable. I give my own opinion upon this matter—probably it may be shared more or less by my colleagues—that the letter was despatched in accordance with the instructions the writer received from Mr. Swanwick himself. That is manifest, I think, from the 8th paragraph of his brother's affidavit, where it is stated, "My brother, Frederick ffoulkes Swanwick, then instructed me to write a sharp letter to Bain, calling upon him to pay Mrs. Sheehan's expenses in the matter, or that proceedings would be taken for an infringement of the Food and Drugs Act." There is only one meaning that can possibly be

attached to those words—that proceedings would be taken under the Food and Drugs Act, for that is the only form of proceedings sanctioned by the Act. There is a provision for a civil action but that is a mere reservation. I believe the letter was written in pursuance of those instructions. That being so, and my brothers concurring with me that this is an act of grave and serious misconduct, it only remains to pronounce the judgment of the court, and that is that Frederick ffoulkes Swanwick be ordered for his misconduct to be disbarred and struck off the roll; leave to apply for readmission at any time after the expiration of twelve calendar months from this date, but within six months after such expired period, one month's previous notice of the application to be given to the board of examiners. The intended application is to be advertised during one month previous thereto in the Brisbane daily newspapers, twice a week in each, and twice a week in one paper circulating in the place or places of his residence during the twelve months preceding the application, if other than Brisbane. The application is to be supported by proof of these matters and by the verified certificate of two respectable householders that during such twelve months he has been a person of good fame and character.

HARDING, J.:—I see no reason to disagree with any part of the judgment of the court as delivered by The Chief Justice, and it is with great sorrow and grief that I come to that conclusion.

PRING, J.:—I agree with the views expressed by The Chief Justice.

LILLEY, C.J. Nov. 22nd, 1882.

ROBINSON *v.* ELWORTHY.

The Crown Lands Alienation Act of 1876—40 Vict. No. 15.

A certificate of the fulfilment of conditions given under subsec. 7 of sec. 28 of the *Crown Lands Alienation Act of 1876* is an instrument of title and can be made the subject of deposit by way of equitable mortgage.

STATEMENT OF CLAIM.

2. On or about the 20th day of October, 1880, Joseph Jackson, a conditional purchaser of some lands under the provisions of the *Crown Lands Alienation Act of 1876*, received from the Commissioner of Crown Lands a certificate of fulfilment of conditions, deposited the said certificate with the plaintiff by way of equitable mortgage to be held by him as security for the payment of certain money then due by the said Joseph Jackson to the plaintiff, to wit, the sum of £150 which had been theretofore advanced to the said J. J. in payment of the rent on the said selection and also as security for all and every such sum or sums of money as the plaintiff might thereafter advance, and the said J. J. further agreed upon request to transfer to the said plaintiff by way of equitable mortgage the lease of the said selection.

3. After the making by the said J. J. of the deposit and agreement in the last paragraph mentioned the plaintiff on the faith thereof advanced and paid to for and on account of the said J. J. £368 3s. 1d.

4. After the plaintiff had made such payment and while he was still the holder of the said certificate the said J. J. on or about the 10th day of June 1881 without the knowledge or authority of the plaintiff transferred the lease of the said selection to the defendant by way of mortgage to secure the repayment of the sum of £400.

5. At the time when the defendant took such transfer he had notice or means of knowledge of the said deposit of the said certificate of fulfilment of conditions with the plaintiff as such security as aforesaid.

6. On or about the 7th August 1881 the plaintiff gave the defendant notice of the deposit of the said certificate with him by the said J. J. and that the said J. J. was then indebted to him in the sum of £360 upon the security thereof.

7. On the 14th September 1881 plaintiff recovered judgment against the said J. J. in respect of the said £360.

8. The defendant on the said 14th September 1881 and with full and actual knowledge of the said security and of the plaintiff's claim in respect thereof and of the fact that the plaintiff had recovered or was that day about to recover judgment

in the said action purchased from the said J. J. his whole interest in the said selection. And the plaintiff claimed :—

1. A delaration that the plaintiff was entitled, under and by virtue of the said deposit of the said certificate of fulfilment of conditions, to an equitable lien or charge upon the said selection.

2. That the plaintiff's said lien was entitled to priority over the defendant's.

And the plaintiff further claimed an account and sale of the said selection.

The defendant, by his statement of defence, denied all the allegations in the statement of claim, and said that :—

6. On the 18th September, 1881, he purchased from the said J. J. the whole interest of the said J. J. in the said selection, and obtained an absolute transfer thereof, which transfer was signed by the said J. J. on the 14th September, 1881 ; and the defendant denied that he had, either at the time of the said purchase, or at the time of signing the said transfer by the said J. J., full, or actual, or any knowledge of the said security, or of the plaintiff's claim in respect thereof, or of the fact that the plaintiff had recovered or was about to recover judgment in the said action.

The case came on for hearing without a jury at the Brisbane Sittings on November 22nd, 1882.

Griffith, Q.C., and *Real*, appeared for the plaintiff; and *Garrick, Q.C.*, and *Power*, for the defendant.

Griffith, Q C, in support of his case cited the following cases :—*Russel v. Russel, 1 White and Tudor, 4th ed., 684 ; Taylor v. Allen, 3 Drury, 26 L.J., Ch., 18: Birch v. Elaynes, 2 Anstruther, 427; Le Neve v. Le Neve, 2 White and Tudor, 4th ed., 47: James v. Rice, 5 De G.., Mc. N. & G., 461 ; Edge v. Worthington, 1 Cox, 211 ; Ex parte Wright, 19 Ves. 258 ; Ex parte Mountfort, 14 Ves. 606*; *In re Hodgson and Another*, application for a *mandamus*, *Courier*, 8th July, 1868 ; *Goodwin v. Waghorn, 4 L.J., N.S., Ch., 172.*

LILLEY, C.J.—The principal question in this case is whether a certificate of the fulfilment of conditions given under sub-section 7 of section 28 to a selector under the *Crown Lands Alienation Act of 1876*, can be made a subject of deposit by way of equitable mortgage. That depends upon the question whether it is in its nature an instrument of title. I have come to the conclusion upon a careful reading of the Act that it must be regarded as an instrument of title. A selector's title begins with a lease for a certain number of years ; he is required to pay rent and to make certain improvements, and perform the conditions of residence as well. The lease is for ten years, and it is not transferable for a certain time. At the conclusion of three years the selector, upon obtaining the certificate under sub-section 7, is enabled to transfer the lease, and certain other important rights are conferred upon the selector, who is entitled to, and has obtained that certificate, in fact, a leasehold estate which was before inalienable by him becomes alienable by the performance of certain conditions, and the possession of that certificate. It is clear, therefore, that the certificate is evidence of very great importance to the strength of his interest in the land. For that reason alone, it seems to me, it would be sufficient to constitute this certificate an instrument of title under the *Crown Lands Alienation Act of 1876*. There is a further important privilege conferred by sub-section 8, which enacts—

"If at any time after the lessee has obtained such certificate from the Commissioner he shall pay to the land agent a sum equal to the aggregate amount of the annual rents which would become due during the unexpired portion of the term of the lease together with the amount of the deed fee and shall prove to the satisfaction of the Commissioner in open court that he has continued up to the time of such payment to fulfil the condition of occupation hereinbefore specified such lessee shall thereupon be entitled to a deed of grant of the land in fee-simple."

So that he has the further important privilege

conferred upon him of converting his leasehold estate into one of fee-simple. To say, therefore, that a certificate of fulfilment is not an instrument of title would be a violation of the whole spirit of the Act. It is a most important instrument of title as it seems to me; it not only entitles the selector, but any transferee, to become the possessor of the fee-simple. That being so, I think the certificate is an instrument of title and subject to the general law. My first finding then is, that the certificate of the fulfilment of conditions is an instrument of title, my second is consequent upon that, that a good equitable mortgage may be made by the deposit of such an instrument. I may say here that I do not recommend people to take titles of that kind unless they get the approval of the lease by the Minister. The third question raised, had the defendant constructive notice at the time he took his mortgage for the £400—had he notice of the deposit with the plaintiff of the certificate of fulfilment? I have come to the conclusion that he had not constructive notice, I think, the facts are not sufficient to affect the defendant with constructive notice of Robinson's claim at the time he took his mortgage. It seems to me that the presumption could hardly arise that Robinson had actually left the selector in possession of the lease. My third finding, therefore, is that the defendant had not constructive notice of the deposit with plaintiff at the time of the advance of the £400. Then comes the question, whether the defendant had express notice of the plaintiff's claim at the time of purchasing, which was subsequent to the lease? When the defendant purchased from the selector the remainder of the term, the equity of redemption, in fact, the whole remaining interest in the land, had he express notice of Robinson's claim? I think he had. It is impossible to escape that conclusion after the evidence of the receipt of Robinson's letter and his answer to it. Fifth.—Robinson's claim is rested mainly upon the deposit of the two promissory notes. I find there was no deposit or promise of security for the first promissory note, there is no evidence of such promise having been given either to Forrester or Robinson. Sixth.—The June, 1880, mortgage transaction was really with Forrester not with Robinson. Mr. Garrick made a very strong objection to the receipt of the memorandum. There was no reason to object to it, because it is further strong evidence that the transaction was with Forrester and not with Robinson. Seventh.—The deposit in October, 1880, was in pursuance of that promise and not of any oral promise to Robinson. I think there is no proof whatever of any oral promise to Robinson; he says:—"When I advanced the money in June this selector gave me this memorandum." That memorandum was addressed to Forrester. Immediately after the certificate was issued the selector brought it to Robinson and said, "I have brought you the certificate I promised to you for your advance," the promise being to Forrester and not to Robinson. Eighth.—Whether the advance of June, 1880, was from Robinson or Forrester upon the promise made to either, or whether the promise was written or oral, the agreement to mortgage was invalid under the statute. Ninth.—There is no evidence of any promise to secure the subsequent advances by Robinson. Tenth.—The deposit in October, 1880, was illegal and void, being in pursuance of the antecedent agreement to take effect on the fulfilment of conditions, which agreement was illegal and absolutely void under the statute. There will therefore be judgment for the defendant.

Solicitor for plaintiff, *Thynne*, agent for *Hamilton and Son*, Toowoomba.

Solicitor for defendant, *Chambers*, agent for *Power*, Gympie.

IN CHAMBERS.

Lilley, C.J. December 1st, 1882.

CAIN *v.* CAIN.

Plaintiff resident beyond the jurisdiction of the Court—Security for Costs.

John Cain, of Goulburn, in the colony of New South Wales, sued his brother, Nicholas Cain, for the recovery of certain land at Kangaroo Point, Brisbane. The defendant

appeared to the writ, and the plaintiff thereupon delivered his statement of claim. The defendant then applied to the plaintiff's solicitor for security for costs, which was refused.

Lilley now applied on summons for security, and referred to the authorities cited in *Archibald's Practice, p. 1139*, and compared the *Judgments Extension Act, 1868, 31 and 32 Vic. c. 54, Archibald p. 1457*, with the Act of N.S. Wales, 19 Vic. No. 2, ss. 1, 2, 3. He also cited *Moreton Bay Oyster Co. v. Emerson*, decided in N. S. Wales.

Fraser (Browne and Ruthning) cited the case of *Danby v. Blakesley* (unreported).

LILLEY, C.J., said that it would be just as well to make a settled rule. If the judges of N.S. Wales refused to recognise the judgments of this Court, and took upon themselves to enquire into the grounds of those judgments, as they had done in *Moreton Bay Oyster Co. v. Emerson*, we must protect ourselves, and make suitors from that colony give security when suing here. We cannot allow the Supreme Court of New South Wales to sit as a Court of Appeal on this Court. The plaintiff must find security for costs to the satisfaction of the Registrar within one month, and all proceedings must be stayed until security is found. Costs of this application to be costs in the cause.

Solicitors for the plaintiff—*Browne & Ruthning.*
Solicitor for defendant—*Porter.*

LILLEY, C.J. March 2nd, 1883.

IN THE WILL OF HENRY ERNSHAW TIDSWELL, LATE OF ALDERNEY, BALMAIN, IN THE COLONY OF NEW SOUTH WALES.

Ancillary Letters of Probate — Executor out of jurisdiction—Security—In re Hope, Q.L.Jl., 11, followed—*In re Paterson, Q.L.Jl., 103,* not followed.

APPLICATION for ancilliary letters of probate to be granted to Henry Parker Tidswell, of Sydney, in the colony of New South Wales, one of the executors named in the will of deceased.

The Attorney-General (C. E. Chubb) applied for ancillary letters of probate to be granted to Henry Parker Tidswell, of Sydney, one of the executors of the deceased, without his being called upon for security, or furnishing any affidavit that there were no debts due in this colony. He stated that the Registrar had refused the grant unless it was shown that there were no debts due in this colony, and that there were no legatees resident within the jurisdiction of the Court that could be prejudiced by the grant, and said that he could not furnish such an affidavit as was required, as there was a business being carried on Ipswich in which the deceased's interests were over £30,000. There was also an interest deceased held in a station property, the value of which was over £10,000, and there are also two persons resident within the jurisdiction of the Court—namely, E. K. Tidswell, of Wigton, and Alice Ann Wilson, wife of N. J. R. Wilson, whose interests were respectively one-seventh share each. He quoted sec. 32 of *Probate Act; In re John Hope, Q.L.J., pp. 11-12; In the Will of L. Paterson, Q.L.J., 103; In re Baldwin*, not reported; and the decision of Mr. Justice Harding, and Mr. Justice Pring *In re Hope, and In re Paterson*, respectively.

HIS HONOR said:—I shall not depart from my rule, which is a salutory and proper one, that where there are debts due in this colony, or legatees within the jurisdiction of this Court, who might be prejudiced by a grant to an executor resident out of its jurisdiction, to require such executor to give security to the amount of such debts and legatees' interests. I shall not follow the English cases on the point. This Court must protect the interests of all parties within its jurisdiction. I shall therefore follow my own previous decision, and that of Mr. Justice Harding, *In re Hope*, and not the decision of Mr. Justice Pring, *In re Paterson.* In this case the Registrar can ascertain the amount of debt now due in this colony, and the value of the legatees' interests within the jurisdiction of this Court, and you can have leave to apply again as to amount of security to be given.

Solicitors for applicant, *Wilson & Wilson.*

PRING, J. March 9th, 1883.

IN THE WILL OF ANTHONY MACKENZIE, OF WALLOONGOON, IN THE COLONY OF VICTORIA.

Ancillary Letters of Probate — Executor out of jurisdiction—Security—In re Paterson, Q.L.J., 103, followed—*In re Hope, ibid 11, and In re Tidswell, ibid 123,* not followed.

Griffith, Q.C., applied for a grant of ancillary letters of probate to executor, resident in Victoria. He cited *Enohin v. Wylie, 31 L.J., Ch. 405.*

PRING, J.:—On this and cases quoted, *In re Paterson, Q.L.J., 103,* by Mr. Griffith on a previous application, I grant the ancillary letters of probate.

Solicitors for applicant, *Hart, Mein, & Flower.*

On a subsequent date His Honor said that it would be better for the practice of the Court to be uniform, and that although he remained of the same opinion as when he granted the applications, *In re Paterson* and *In re Mackenzie,* The Chief Justice and Mr. Justice Harding having decided differently, he should in future follow their decisions.

FULL COURT.

April 3rd, 1883.

LITTLE *v.* MCDONALD AND OTHERS.

Demurrer—Fraud—Fiduciary relationship.

THIS was a demurrer on the part of some of the defendants to the plaintiff's statement of claim. The statement of claim and demurrer is in substance as follows:—

STATEMENT OF CLAIM.

2. On the 9th of April, 1880, the said Dagleys, together with one John Duke Little, applied for and obtained a lease of a certain gold mining area, situated at Charters Towers aforesaid, and known and registered as lease No. 264. The said leasehold was under the management of the said Dagleys, and was worked by the said Dagleys in person and by men whose wages the said John Duke Little was responsible for and had agreed to pay, he, the said John Duke Little, being a resident of Thornborough.

3. Shortly after the said Dagleys and the said Little obtained the said lease No. 264, the defendants Dagley gave the defendant J. McDonald a lien over their share in the said lease to secure the payment of a promissory note for £100, given by them to the said J. McDonald.

4. On the 10th of January, 1881, the said Dagleys, on behalf of themselves and the said J. D. Little, and as managing owners of and in the said leasehold, applied for and obtained an order exempting the said lease from being worked for six months from the date of the said order. The exemption was granted, subject to the condition that the holders of the lease—*i.e.*, the said Dagleys and J. D. Little—would keep the water in the said lease below the 178 feet level.

5. The said J. D. Little possessed at the time aforesaid, and at the times next hereinafter mentioned, a one-half share in the said lease No. 264.

6. On the 21st of January, 1881, J. D. Little transferred his said one-half share in the said lease to the plaintiff, and the said Dagleys had notice thereof, and after the said transfer continued to manage the said leasehold on behalf of themselves and the plaintiff.

7. The defendant J. McDonald had, on the said 21st of January, and at all times hereinbefore mentioned, full knowledge of the said J. D. Little's interest in the said lease.

8. Previously to the said 18th day of January the said J. McDonald had frequently requested and endeavoured to procure the said Dagleys to do, or omit to do, some act whereby they might cause the forfeiture of the said lease without the knowledge of J. D. Little, and for the purpose of fraudulently depriving the said J. D. Little, of his interest therein—he, the said J. McDonald, at the time when he so requested the said defendants, offering and agreeing with them that, in consideration of their so doing, and thereby enabling him to apply for and obtain the land comprised in the said lease in his own name, he would hold in trust for the defendants such a share in the said lease so to be applied for by him as would be equal to the interest they then

held in the said land under lease No. 264, but would hold the balance to his own use, thereby fraudulently depriving the said J. D. Little from any share or interest in the said lands under the said lease No. 264; and the said J. McDonald as a part of his inducement to the said Dagleys to fraudulently cause a forfeiture of the said land, offered and agreed that upon obtaining the said land in his name, and in addition to holding the same in trust for the said Dagleys to the extent aforesaid, he would provide money and machinery at his own expense for the more advantageous working of the said lands.

9. During March, 1881, and for some time previous thereto, the said Dagleys were largely indebted to the said J. McDonald.

10. In March, 1881, and during the period of exemption in paragraph 4, mentioned, the said J. McDonald again requested the said Dagleys to do, or omit to do, some act whereby the said lands might be forfeited, and thereupon it was agreed between them, without the knowledge of the plaintiff or of the said J. D. Little, that they the said Dagleys, would do some act whereby the said lands might be forfeited, and that he, the said J. McDonald, in consideration that the said Dagleys so fraudulently acting and upon forfeiture of the said lease, would procure in his own name a lease of the said land, and would hold a share equal to the interests of the said Dagleys in trust for them, but the balance to his own use only, that, in addition to holding the said shares in trust for the said Dagleys, he would release them from all debts due to him, and discharge all other sums of money due by the said Dagleys to certain other creditors not necessary to name, and would also supply money and machinery for the better working of the said land.

11. The said Dagleys, in pursuance of the agreement aforesaid, ceased to pump the water in the said land on the 10th of March, 1881, and, in consequence, the water rose considerably above the 173 feet level, and thereupon one John T. Henderson, who was holder of an adjoining mining area, at the instigation of the said J. M'Donald summoned the said Dagleys for not keeping the water down in the said leasehold.

12. The said Dagleys, in pursuance of their agreement aforesaid, and being thereunto fraudulently advised by the said J. McDonald, did not enter an appearance to the said summons; and the matter coming on for hearing before the Warden at Charters Towers aforesaid, the Warden cancelled the said exemption, and afterwards, upon complaint made by the said J. McDonald, in collusion with the said Dagleys, recommended that the said lease be forfeited, and the said lease No. 264 was thereupon and by reason of the acts aforesaid duly declared to be forfeited, and a preferent right given to the said J. McDonald to take up the land comprised therein as a claim or lease.

13. Neither the said J. D. Little nor the plaintiff had any notice of all or any of the facts or proceedings mentioned in paragraphs 9, 10, 11, and 12; and all the said acts and proceedings were done by the said Dagleys and the said J. McDonald without knowledge or authority of the plaintiff or the said J. D. Little.

14. On the 19th April, 1881, the said J. McDonald, in pursuance of his agreement with the said Dagleys, applied for and obtained a lease of the said land in lease No. 264, together with other land, which said lease was known and registered as No. 287.

15. Prior to the granting of lease No. 287 the said J. McDonald, in pursuance of the agreement aforesaid, paid certain debts owing by the said Dagleys.

16. The plaintiff did not receive notice, and had no knowledge of the facts set out in the eight preceding paragraphs hereof, or of any of them, or of the manner in which the forfeiture was brought about, or of the circumstances under which the said land was applied for and obtained by the said J. McDonald. Before the 10th of April, 1882, and up to that time, the said Dagleys worked the said land under lease No. 264 with the knowledge and consent of the

said J. McDonald concealed from the plaintiff and the said J. D. Little all the facts in the eight preceding paragraphs hereof.

17. The said J. McDonald transferred the said lease No. 287 to the defendants M. McDonald and T. Kelly, voluntarily and without consideration.

18. The said M. McDonald and T. Kelly have since surrendered the said land under lease No. 287 for the purpose of obtaining a new lease of the said ground and some other ground, and have obtained a new lease, including all the ground aforesaid.

19. At the time of the transfer of the said lease No. 287, and thenceforward to the present time, the said M. McDonald and T. Kelly had knowledge of the facts set out in paragraphs 8, 9, 10, 11, 12, 13, and 14 hereof.

20. The ground comprised in lease No. 264, and subsequently included in lease No. 287, is now included with other land in the lands obtained by the said M. McDonald and T. Kelly upon the surrender of lease No. 287, and is of great value, and large quantities of gold have been raised therefrom, which said gold the defendants have applied for their own benefit.

The plaintiff claims :—

1. That the said M. M'Donald and T. Kelly may be declared to hold the original interest of the plaintiff—*i.e.*, one-half interest in the said ground formerly under lease No. 264, but now under the said lease of the defendants as trustees for the plaintiff, and that all the defendants may be ordered to concur in doing all such acts, matters, and things as may be necessary to transfer the said interest to the plaintiff.

3. The plaintiff claims £2000 damages in the alternative.

The defendants T. Kelly, Mary McDonald, and J. McDonald demurred to the statement of claim, on the ground that the same was bad in law, because it showed that no fiduciary relationship ever subsisted between the plaintiff and the said J. McDonald in respect of lease No. 264 mentioned in the statement of claim, and on the ground that lease No. 287 was not subject to any trust or equities in the hands of the said J. McDonald, and on other grounds sufficient in law to sustain a demurrer.

Griffith, Q.C., and *Murray-Prior*, in support of the demurrer, cited *Fox v. Mackereth, 1 White & Tudor, 138; Lumley v. Gye, 2 E. & B., 216; Bowen v. Hall, 6 Q.B.D., 333; Eyre v. Burmuth, 10 H.L., Cas. 90; Keech v. Sandford, 1 White & Tudor, 44.*

There was no appearance for the plaintiff.

Harding, A.C.J. :— The land in respect of which this action is brought was taken up in April, 1880, and the defendants—the Dagleys and Little—obtained and a lease, No. 264, was granted to them as a gold mining area, and it was worked by the Dagleys in person and by employed men, for whose wages Little was responsible and had agreed to pay, he then being a resident of Thornborough. After that it became desirable that the property should be registered as exempt from work for a certain time, and it was so registered, under the condition that the water should be kept below a certain depth, and if it was allowed to rise above that depth power existed in the Government to forfeit the lease. McDonald, knowing these circumstances, entered into an agreement with the Dagleys and prevailed upon them to allow the water to rise above this level—in other words, to allow a ground of forfeiture to accrue. It is alleged that, as an inducement to do this, McDonald promised the Dagleys to remit a debt which they owed him, and to erect machinery and lay out moneys upon the property, if upon the forfeiture the property should be allotted to him, and that he would divide the property, so that the Dagleys would have what they had before increased by the expenditure on the property and the remission of their debt, and he would obtain the plaintiff's share. The Dagleys appeared to have succumbed to this persuasion; the water did rise, forfeiture was declared, the land was taken up by McDonald, and transferred by him to Kelly and Mary McDonald, the

demurring defendants. The plaintiff, by his statement of claim, seeks to have it declared that so much of the property comprised in the present lease as represented the old property shall be held by the defendants as trustees for him; that accounts be taken of all the gold raised; and in the alternative, damages in respect of the fraud, deceit, or conspiracy, or whatever the transaction is called. The defendants demur to this, on the ground that no fiduciary relationship ever subsisted between the plaintiff and McDonald in respect of the lease No. 264, and also on the ground that lease No. 287 was not subject to any trust or equities in the hands of McDonald. It has been argued by Mr. Griffith that there was no duty imposed on the Dagleys to refrain from committing the forfeiture; and as the pleadings at present stand, I think he has substantiated that ground. Co-owners in mining properties have not yet been held to be either partners or co-trustees one for the other, although under certain circumstances these relations frequently and constantly arise. That being so, the plaintiff is bound to state a case showing the Dagleys were under some duty towards him—that is to say, that they were bound to look after his share; but I find no statement to that effect, except what I have read in the statement of claim, that they were to manage it, and that the plaintiff was responsible and had agreed to pay the wages of the employed men. I do not find any binding agreement upon them to carry it on, nor do I find it stated what were the conditions precedent binding them to carry it on, nor an allegation which amounts to a statement that the plaintiff had performed all the duties upon his part which rendered it a breach of duty on the part of the defendants to permit the forfeiture.

Solicitor for the plaintiff, *Guthrie*, agent for *Milford*, Charters Towers.

Solicitors for defendants, *Daly and Hellicar*, agents for *Marsland*, Charters Towers.

IN THE MATTER OF THE BRISBANE MUNICIPAL COUNCIL *v.* WATSON AND OTHERS.

Local Government Act of 1878 (42 Vict. No. 8), ss. 176 and 185.

Under Sect. 185 of the *Local Government Act of 1878*, the justices have only power to inquire into the correctness or incorrectness of the valuation of property coming within the provisions of sect. 176 of the Act, and to amend the valuation if they deem it necessary, they have no power to decide whether property is rateable or not.

THIS was a motion to make absolute a rule *nisi* for a writ of prohibition against John Watson and other justices, and Emily Condon, Bridget Murphy, and Ellen Whitley, restraining them from proceeding upon a certain order or judgment given by the said justices on the 15th of March, 1883, in the matter of an appeal by the said E. Condon, B. Murphy, and E. Whitley, against the valuation of certain property within the Brisbane Municipality, and by which decision the said justices assumed jurisdiction to decide the appeal, and to decide that the said property was exempt from rating, coming within the exemptions specified in section 176 of the *Local Government Act*. The rule was granted on the ground that the justices had no jurisdiction to determine the question whether the property was rateable or not.

Griffith, Q.C., and *Rutledge*, appeared to move the rule absolute; *Real*, to show cause.

Real argued that the present proceeding was not a proper one, and that instead of a writ of prohibition being asked for, it should have been a mandamus directing the justices to inquire into the valuation of the property, and in support of this, he cited *R. v. Townley, Queensland L. Reps. 1877, p. 21*, a case decided under the *Municipal Institutions Act of 1864*. Who was to decide what was rateable property or not, or whether property was within the Municipality or not? The justices were not to receive any objection against a rate in the Appeal Court, notwithstanding the fact that the property was not rateable at all and was not within the municipality, but they could only decide whether the rate was excessive or not, if the contention

of the Corporation was correct. The objection raised by the appellant in the Appeal Court was merely a preliminary one, and related to the jurisdiction. They decided that the property was not rateable and that they could not inquire into the valuation. In this case, he contended there had been no valuation, for the valuer could only value rateable property. The Corporation could have proceeded in another way under the statute. The 186th section of the Act provided if at the hearing of the appeal a question of law should arise, the justices should state and record their decision, and if either party were dissatisfied there might be an appeal to the Supreme Court. The question raised preliminary to the jurisdiction of the justices prevented them from proceeding with the appeal in the usual way. He contended that the valuation was not good in law, and that the justices were the only persons who could decide whether property was rateable or not.

Griffith, Q.C., said that the *Local Government Act of 1878* had substituted for the provisions of *Municipal Institutions Act* which gave courts of the petty sessions power to inquire into the validity of a rate, a special power to inquire into the valuation. Under the 79th section of the Act of 1864, an appeal could be made against the whole assessment, and the court held that that word gave justices power to inquire into the whole matter of the rate. In *R. v. Townley*, that was the point decided, and the court found that no valuation had been made. The Act of 1878 provided that any person who considered himself aggrieved on account of the valuation could appeal to a court of petty sessions, and the justices would determine all objections to the valuation on the ground of incorrectness, but they could deal with no other objection whatever. The justices could deal only with the correctness of the valuation, and had no jurisdiction to determine what property should or should not be rated. The question of deciding whether property was rateable or not was a serious one. In Victoria, there had been an appeal to the Privy Council on the matter. The Legislature had carefully guarded against giving a scratch bench power to decide such a question. If the Corporation put in a distress warrant illegally they would have to take the consequences. He argued that if the justices could decide what was not rateable, they could say also what was rateable. They had jurisdiction to reduce a valuation to five shillings, but they had presumed, not to judge whether it was correct, but that it was void. He moved the rule absolute.

Harding, A.C.J. :—This is a motion by Mr. Griffith, on the part of the Corporation of the Municipality of Brisbane, to make absolute an order *nisi* granted by this court on Tuesday, 3rd April last, returnable to-day, calling upon John Watson, Edmund MacDonnell, and A. R. H. Pietzcker, justices, and Emily Condon, Bridget Murphy, and Ellen Whitley to show cause why a writ of prohibition should not be issued to restrain them from proceeding on and in respect of an order of the justices, given on the 15th ultimo, in the matter of the valuation of certain property. The rule was granted, on the ground that the justices having no jurisdiction had decided that certain property was exempt from municipal rates.

The facts of the case so far as it is necessary to narrate them, are that certain property situated in the Municipality of Brisbane had been valued under the *Local Government Act;* this property belonged to the Sisters of Mercy, and they desired to appeal against the valuation, and gave notice of such appeal. It came on before the justices on the 15th March last, and the objections, which in substance are those now taken, were then urged by Mr. Rutledge. The bench took evidence to show that the property was not rateable, and decided without taking any evidence as to the value of the property to allow the appeal; that is to say, to upset the valuation. The question arose more particularly upon the 185th section of the *Local Government Act.* It arose by reason of certain property being exempt from rates by the 176th section. But the 185th

section provides: "If any person think himself aggrieved on the ground of incorrectness in the valuation of any rateable property he may at any time within one month after he has received notice of such valuation appeal to the justices in some court of petty sessions held within the municipal district if there be any holden there and if there be none or more than one then to the court of petty sessions held nearest to the municipal district . . . and the justices there present shall hear and determine all objections to the valuation on the ground of the incorrectness, but no other objections, and shall have power to amend the valuation, and their decisions shall be final upon the questions of facts determined by them." On the argument of this motion the 177th, 180th, 186th, and 187th sections of the Act were also referred to. To my mind the question for decision is the meaning of the word "incorrectness." Does that extend and mean that the property would be incorrectly valued if not rateable? I think that the words of the section are sufficiently explicit, and the "incorrectness" is tied down more especially by the second paragraph of the section to mean to amend the valuation and nothing further. During the course of the argument suggestions as to probable hardships which might arise have been thrown out by the Bench, and have been, I think, sufficiently answered by the Bar to prevent them having any influence upon the construction of the Act. I think the rule must be made absolute.

PRING, J.:—This case appears to have come on before the magistrates on an appeal by the Sisters of Mercy against a certain valuation of property owned by them, and the notice of appeal was that the property was exempt from being rateable under the 176th section of the Act. The magistrates took evidence in the matter, and found the property to be exempt from rates, and then proceeded to allow the appeal. The question seems to be whether they had the jurisdiction to determine that point or not. Under the 185th section it is clear that whatever may be the hardship, all the justices had to determine was the correctness of the valuation. If they did anything else, it should have been to dismiss the appeal, and not to allow it. The rule must be made absolute.

Solicitor for the Corporation, *Macpherson.*
Solicitor for respondents, *Thynne.*

MATHERS *v.* ELLERY.

Goldfields Act of 1874.—Jurisdiction of the Warden.

THIS was a special case stated under section 74 of the *Gold Fields Act of 1874*, on the hearing of an appeal from the decision of G. L. Lukin, Gold Warden of Gympie, in the matter of a complaint heard and determined before him, sitting at Kilkiven, in which Ellery complained that Mathers did by his objections to the application of the complainant for one sixteenth share in quartz claim No. 679 in the Kilkivan Goldfield, registered in the name of the defendant in the Warden's register, prevent the complainant from being registered therefor as requested in the application, and prayed—(1). That the defendant might be ordered to withdraw the objection; (2) that the said one-sixteenth share standing in the name of the defendant might be forfeited and the registration thereof cancelled; (3) that the defendant might be adjudged to have abandoned the same; (4) that the plaintiff might be registered therefor in the Warden's register. The case was heard before the Warden at Kilkivan, and he found that the defendant had abandoned the one-sixteenth share in protection area No. 37 situated at Kilkivan, and known as the Long Tunnel, and ordered that the objection of the defendant to the registration of the plaintiff for the said share be removed, and the plaintiff be registered for the same. On the hearing of the appeal to the District Court, *Power*, for the plaintiff, objected to the jurisdiction of the Warden when the original case was heard, on the grounds—(1) That no Warden's Court had been proclaimed by the Government at Kilkivan, under sec. 31 of the *Goldfields Act of 1874*, and the case was one that could only be heard in a Warden's Court. (2) That Warden Lukin was not an officer appointed by the Governor under sec. 34 of the said Act to discharge the duties of the Warden at Kilkivan, and therefore had no jurisdiction to sit there as Warden. *Real*, for the defendant, admitted that no Warden's Court had ever been proclaimed at Kilkivan under sec. 34 of the said Act and that Warden Lukin was not an officer specially appointed by the Governor under section 34 of the said Act to discharge the duties of Warden at Kilkivan. There was evidence to show that Warden Lukin was appointed a Gold Warden of the colony, and was gazetted Warden of the Upper Mary Goldfields. District Court Judge Miller affirmed the order of the Warden, but reserved the point as to the jurisdiction for the opinion of the Supreme Court. The question for the opinion of the Court was:—Had the Warden jurisdiction to hear at Kilkivan, no Warden's Court having been proclaimed under sec. 31 of the *Goldfields Act of 1874?*

Power, for the appellant, relied on secs. 31, 32, 33, 34, 35, 36, 61-66, and rules 27 and 28 thereunder, and argued that—(1) The case could not be decided by the Warden alone at Gympie; (2) The case could not be decided at Kilkivan, even if the court was established, because the defen-

dant resided at Gympie; (3) The case could not be tried by the Warden anywhere, and cited *Bullen v. S. N. Zealand Co., Queensland L.J., p. 51.* Sec. 84 showed that a Warden was not intended to act outside his district. The other Wardens might have been appointed under sec. 84. *R. v. Collick*, October Assizes, Rockhampton, 1879.

Real, for the respondent.

Harding, A.C.J., having stated the facts of the case, said:—The first point to which I address myself is, the reason given by the learned judge for reserving the point—namely, that the evidence shows that from the commencement of the *Gold Fields Act* the Warden at Gympie was accustomed to sit at Kilkivan and hear and determine cases there. The law as to the presumption arising from a person acting in an official capacity that he is properly appointed to exercise that capacity is stated, and I adopt that statement, in *Taylor on Evidence, section* 171. I think, therefore, that from this statement it must be presumed that the Warden at Gympie had acted in an official capacity at Kilkivan in hearing and determining the case there. And I think that the cases there referred to are of a similar nature to the one stated in this special case, and I think we are entitled to presume that he was duly appointed to exercise that official capacity, and that so long as that presumption remains unrebutted it is absolute; or, in other words, so soon as that presumption was raised, the onus of proof was thrown upon the other side to show that he was not properly exercising that capacity. Having explained what I consider to be the meaning of the learned judge's reason, I now proceed to examine the *Gold Fields Act.* Under that Act there appears to be at least four different jurisdictions under which goldfields may be regulated. First of all there is the provisional jurisdiction of the Warden in the case of gold being discovered where it was not known to exist before. According to the 24th section of the Act the discovery is reported to the Warden of the goldfield nearest the situation of the discovery, and on notification of such discovery to the Warden he posts a notice outside his office, which notice has the effect of a provisional proclamation of the area as a goldfield. Presuming that Mr. Lukin had been properly appointed, it might have been that the circumstances arose by Kilkivan being discovered subsequent to Gympie becoming a provisional goldfield under the Act; but the presumption carries it further than that. Secondly, there is the Gold Warden simply who under the 29th section is to exercise the jurisdiction conferred by the regulations, and can under section 30 "have and exercise jurisdiction in respect of the matters hereinafter contained throughout the colony with power to issue summonses, warrants, or other process which shall have legal effect and operation throughout the said colony." Though a Warden is appointed to act throughout the colony, he has no power until he is located, that is to say, until he is appointed to a certain goldfield his powers do not come into operation. In addition to his powers, the Warden must have what I define as location. As soon as he has location he has all the powers without the necessity of a Warden's Court being proclaimed in that district. In other words, using the words of The Chief Justice in *The South New Zealand Co. v. Bullen*, at p. 51: "Does the jurisdiction of the Warden extend to anything more than the physical dealing with the land?" Then there is the third jurisdiction, the highest and most complete, when a Warden's Court has been proclaimed and a Warden appointed, the Warden appointed to preside over and hold the court has certain additional and larger powers than he had before. Then there is the fourth jurisdiction, and that is under the 84th section:—"Whenever a goldfield shall have been proclaimed under this Act and a Warden's Court shall not have been established, it shall be lawful for the Governor to appoint a fit and proper person who shall be a justice of the peace to discharge the duties of Warden, and such officer shall have the same jurisdiction and all the powers and authorities conferred upon a Warden by this Act." That is to say, the justice so appointed has all the powers of a Warden without putting the colony to the expense of providing a Warden's Court until the interests of the place require some further protection. These being the four jurisdictions, we must presume that Mr. Lukin exercised such a one as came within his power. Then I go to the 7th regulation to ascertain what the case was; and by that regulation I find that upon receipt of any objection, if the necessities of the regulation have been complied with, "the Warden shall defer registration until the matter has been heard and determined, and shall thereafter be guided by the evidence submitted to him or by the order of the Warden's Court." I am of opinion that Mr Power's contention, that the fact that no Warden's Court had been proclaimed at Kilkivan, is not sufficient to avoid the decision. I think the Warden, under the circumstances appearing, had jurisdiction to hear the case at Kilkivan, notwithstanding that a Warden's Court had not been proclaimed, and the question must be answered in the affirmative.

Pring, J.:—I entirely concur in the judgment.

Solicitors for appellant, *Wilson & Wilson.*

Solicitor for respondent, *Power*, Gympie.

FULL COURT.

May 8th, 1883.

VICKERS *v.* SELLHEIM AND OTHERS.

Brands Act, (35 Vic., No. 4), Section 27.

The fact of a brand being found put over the registered brand of the owner of a beast does not raise the presumption that the owner of the former brand either put it there or allowed it to be put there.

MOTION to make absolute a rule *nisi* for a prohibition granted by His Honour The Acting Chief Justice at the instance of George Vickers against Phillip Frederick Sellheim, P.M., at Charters Towers, Joseph Booth Whitehead, J.P., and John Inch, both of the same place. A calf, the property of Inch, was branded by him with his registered brand, and lent by him in company with his mother to one Cass, a dairyman. While in Cass' possession, the cow and calf were lost sight of for some time, and eventually the calf was found near Vickers' house with his registered brand newly put over that of Inch. There was no direct evidence of branding, and Vickers did not appear. The bench, consisting of Sellheim and Whitehead, convicted Vickers of wilfully permitting the calf to be branded with his registered brand, and fined him £10, and £3 1s. 6d. costs. The rule was granted on the ground that the evidence did not support the conviction.

Griffith, Q.C. (*Gore Jones* with him), moved the rule absolute.

Feez showed cause, and submitted that under the 27th section of the *Brands Act*, if there was sufficient evidence to support the justices, finding that the calf was permitted to be branded by Vickers, the court would not interfere with the finding that he had wilfully permitted the same. This was decided by the late Chief Justice, Sir James Cockle, in *Ex parte Kelly, Wilkinson, page 9.* So that all the court would have to find was, did Vickers permit the calf to be branded with his registered brand. Of this there was no direct evidence, but there was such presumptive evidence as would support the conviction. The fact of Inch's calf branded with his brand being found near Vickers' house newly branded with his brand over Inch's brand raised such a reasonable presumption that Vickers permitted it to be branded that it was for him (Vickers) to rebut that presumption, and this he had not done. If the court held such evidence as this to be insufficient the section of the Act might as well be cut out of the Statutes, for it was almost impossible to get direct evidence of any offence under the section. On these grounds the rule should be discharged.

Griffith, Q.C., contended that to uphold such a conviction would be to subvert all the principles of criminal law embodied in the maxim "Every man is presumed to be innocent till proved guilty." There was absolutely no evidence either direct or presumptive of Vickers wilfully permitting the calf to be branded, and the rule should be made absolute with costs.

HARDING, A.C.J.:—This is a motion by Mr. Griffith to make absolute a rule *nisi* granted by me on the 2nd April, 1883, for a prohibition against the magistrates and the complainant proceeding on a conviction or order made 1st February, 1883, whereby Vickers, the applicant for the prohibition, was found guilty of wilfully permitting to be branded with his registered brand a certain white heifer. The offence was charged under section 27 of the *Brands Act of 1872*, which enacts "If any person shall wilfully brand any stock of which he is not the rightful owner or shall wilfully cause direct or permit any stock of which he is not the owner to be branded with his brand such person shall on conviction for every such offence in a summary way forfeit and pay any sum not exceeding fifty pounds." The requirement to bring the offender within that section is that he shall wilfully cause, direct, or permit any stock of which he is not the owner to be branded with his brand. First of all you must have stock branded with the brand of a person not the owner of that stock, then you must show that that brand was wilfully permitted to be placed on the stock by the owner of the brand. The meaning of the word "wilful" is now understood to be and according to the most recent decisions is "knowingly, and fraudulently." Therefore a

brand must have been permitted to be on the stock knowingly and fraudulently on the part of the person whose brand it is, that is, that he must have permitted the brand to be placed on stock of which he was not the owner with the fraudulent intent in most cases to acquire the ownership in the stock. It was contended by Mr. Feez, that the mere fact of the brand being found on the stock would raise a presumption that the person whose brand it was had branded it and committed an offence. I can see if a brand is found upon a beast and it is proved that the owner of the brand put it there the law will presume he put it there knowingly and fraudulently, but the mere finding of a brand upon a beast without proving that the owner of the brand put it there or permitted it to be put there does not connect the owner of the brand in any way with the branding. Mr. Feez's presumption would go to this extent: if John Smith was found murdered every person would be presumed to have murdered him; but the proper way to look at such reasoning is this: If A.B. had killed John Smith the presumption would be that he had murdered him until the contrary was shown. Now here the only facts in the case are that the heifer was the property of Inch, the respondent, that it had his brand upon it, and that it was subsequently found with Vickers' brand upon it, and shortly afterwards seen in the neighbourhood of Vickers' residence, and further, the respondent said that Vickers might have branded it in mistake. I can see no evidence to connect him with the offence charged. Under these circumstances I think the evidence does not support the conviction, and that this rule must be made absolute with costs.

PRING J.:—I am of opinion that there was no evidence to support the conviction, and that the rule must be made absolute with costs.

Solicitors for applicant, *Daly & Hellicar*, agents for *Marsland*, Charters Towers.

Solicitor for respondent, *J. S. Salmond.*

THE QUEEN *v.* HOBLER.

Quo warranto—Void election—Disclaimer—Practice—Costs.

The court will make a rule for a *quo warranto* information absolute, although the defendant has resigned the office and his resignation has been accepted before the rule was obtained, when the object of the relator is, not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office. In making the rule absolute the court will exercise a discretion as to costs.

THIS was a rule for an information in the nature of a *quo warranto*, calling on the defendant to show by what authority he claimed to be a member of the Divisional Board of the Division of Gogango, and to exercise the office of such member, upon the grounds that, at the election for the said Division held in the month of February, 1883, a majority of votes was polled in favour of the relator Dempsey and not in favor of the defendant, also that nine votes lawfully recorded in favor of the relator at the said election were wrongfully rejected by the returning officer.

It appeared from the affidavits, that the election was held at Rockhampton in the month of February, 1883, and that William Pattison, chairman of the said division, acted as returning officer. The relator Dempsey, and the defendant were nominated as candidates. Nine ballot papers containing votes on the relator's behalf were rejected by the returning officer. The consequence was that the votes in favor of each candidate were equal, and the returning officer gave his casting vote in favor of the defendant, and declared the defendant duly elected. On the 3rd of April, the defendant resigned. On the 30th April, the present rule for a *quo warranto* was obtained.

Murray-Prior showed cause. The defendant did not oppose the rule, but undertook to enter a disclaimer. The defendant resigned as soon as he found out his election was not valid. Under the circumstances the court will give the relator no costs. The *Queen v. Blizard, L.R., 2 Q.B., 55; Gray on costs.*

Griffith, Q.C., and *Sheridan* in support of the rule. The defendant has shown no particular reason why the ordinary practice of the court

should be departed from, and the relator is entitled to costs.

HARDING, A.C.J.:—This matter comes on upon a motion of Mr. Griffith, to move absolute a rule *nisi* obtained on the 13th April, to shew cause why an information in the nature of a *quo warranto* should not be exhibited against Hobler the respondent upon the grounds: 1st. That at the election a majority of votes was polled for the said division in the month of February, 1883, in favor of the said Timothy Dempsey, and not in favor of the said Francis Helvetius Hobler; 2. That nine votes lawfully recorded in favor of the said Timothy Dempsey at the said election were wrongfully rejected by the returning officer.

The matter arises under the recent Divisional Boards Act, the Amending Act of 1882, section 9, subsection 5, which enacts that "No person who is a candidate or agent of a candidate for the office of a member of a board shall witness the signature of a voter to a ballot-paper for use in the election then pending for such office and any such person who so witnesses a signature shall be deemed to have committed an offence against this Act." The election for the Gogango Board was held on the 14th February, 1883; at this election the chairman was William Pattison, of Rockhampton. The candidates for election were the applicant Timothy Dempsey, and the respondent Hobler. Previous to this election one Riley, a duly qualified voter for the division, had attested the signatures of several voters of the division, and on the day of the election he was appointed by the applicant Dempsey as scrutineer at the election, and on the ground that as such scrutineer he was the agent of Dempsey the returning officer rejected the votes he had attested previously, amounting to nine, and on the counting of the votes it was found that excluding these nine votes the votes were equal, and the chairman gave his casting vote in favor of Hobler and declared him to be duly elected. It appears from the affidavit of Dempsey that when Pattison rejected these votes he objected to the rejection and claimed to be duly elected, but the said Pattison declared the votes to be equal and gave his casting vote in favor of Hobler, and thereupon declared him duly elected. From that it appears that at the time of the chairman's decision, Dempsey disclosed his objection, and from that time to the present the respondent might have been, if he was not, fully aware of the grounds of that objection. In the face of that Hobler has acted as a member of the board and continued to act until a very short time before the first affidavit in support of the application was filed. It was suggested at the bar that he withdrew and resigned, which as a matter of fact he did as soon as he found that his position was not tenable. These are the facts of the case. In order that the applicant Dempsey should have the seat he might be entitled to if he had a majority of votes, it is necessary that Hobler, the man elected, should never have acted, or if he has acted, that he should disclaim. A disclaimer was necessary when he took upon himself the office, but having taken upon himself the office a further judgment is necessary against him, it is necessary that the applicant should obtain a judgment of ouster. In order to carry this out the proceedings are that an information in the nature of a *quo warranto* cannot be filed with the officer of the court without the leave of the court, therefore it became necessary for the applicant to obtain the leave of this court. Upon that being filed Hobler has undertaken to file a disclaimer, and upon that being done it is possible a judgment of ouster may follow. Upon these facts, the learned counsel for Hobler has submitted that this rule should be made absolute without costs, asking us to depart from the usual rule that the successful party should have his costs. In support of that he refers us to *Reg. v. Blizard, L.R., 2 Q.B., 55*, in which the rule was made absolute without costs. Reading that alone without the explanation of the learned Chief Justice, it would seem that it should be followed in this case, but in his judgment Lord Chief Justice Cockburn says:—"If the true nature of the disqualification had been pointed out in the first instance, the probability is

that the defendant would have been immediately advised that he could not exercise the functions of returning officer and also at the same time offer himself as a candidate, and he would have withdrawn from that position, or at all events he would not have taken upon himself to be admitted and sworn into the office which for some days he filled." That is the reason the rule was departed from—namely, that the applicant had not disclosed the ground upon which he claimed to avoid the election. In this case he had objected to the chairman. The reason does not apply in this case, and I think the rule should be made absolute with costs in the ordinary manner.

PRING, J.:—I concur entirely in the judgment of The Acting Chief Justice.

Solicitor for Dempsey, *Winter*.

Solicitor for Hobler, *Brown* (*Jones & Brown*), Brisbane and Rockhampton.

PRING, J. May 29th, 1883.

VANCE *v.* MACFARLANE AND ANOTHER.

Married woman—Separate estate.

THIS was an action brought by Olivia Vance, the wife of John William Vance, deceased, against the trustee of the will of the said John William Vance, and the Curator of Intestate Estates for this colony. The statement of claim is as follows:—

1. The plaintiff resides at Rosewood, in the colony of Queensland, and is the widow of John William Vance, deceased, late of Rosewood, aforesaid. The defendant, John Macfarlane, is the trustee of the will of the said John William Vance, appointed by order of this Honorable Court, dated 20th day of February, 1883.

2. On the 22nd day of August, 1867, the plaintiff, being then the wife of the said John William Vance, duly made application in her own name under the provisions of the *Leasing Act of 1866*, (*30 Vic., No. 12*), for a certain portion of land situated at Rosewood aforesaid, being portion 7, in the county of Churchill and parish of Walloon, containing 80 acres, and the plaintiff at the time of making the said application paid to the land agent for the said district out of her separate estate the full amount of the first year's rent of the said land and the survey fee, and was duly declared the lessee of the said land, and a lease of the said land was afterwards issued to her; the said application and payment were made, and the said lease was issued with the knowledge, approbation and consent of the said John William Vance.

3. The plaintiff, afterwards from time to time as the rent for instalments as purchase money of the said land became due, paid the same with the like knowledge, approbation and consent out of her separate estate.

4. The said land was always treated by the plaintiff and her said husband as her separate property, and she from time to time dealt with the same as such, and sold a portion thereof and received the purchase money therefor.

5. In the month of August, 1874, the plaintiff, at the request and for the benefit of the said John William Vance, borrowed £100 from one James Foote, of Ipswich, in this colony, merchant, on the security of the said land, and paid the said money to the said John William Vance, and on the 3rd day of August, 1874, the plaintiff transferred the lease of the said land to the said James Foote by way of mortgage to secure the said sum. The plaintiff continued however to pay the rent or instalments of purchase money for the said land out of her separate estate.

6. On or about the 15th day of December, 1876, a deed of grant in fee simple of the said land was issued to the said James Foote.

7. In or about the month of February, 1877, the said John William Vance without the knowledge or consent of the plaintiff repaid to the said James Foote the money borrowed from him by the plaintiff as aforesaid, and the said James Foote at the request of the said John William Vance, and without the plaintiff's knowledge or consent transferred the said land to the said John William Vance, and a certificate of title No. 44,392 was issued for the said land in the name of the said John William Vance.

8. The plaintiff some time afterwards discovered

that the said John William Vance had obtained such certificate of title, and immediately thereupon demanded from him a transfer of the said land to her, but the said John William Vance, who was then in ill health, informed the plaintiff that he had devised all his property to her absolutely, and at the the same time handed her a will duly executed by him, bearing date the 31st day of January, 1876, whereby he devised and bequeathed all his property to the plaintiff for her sole use and benefit. He further represented to the plaintiff that it was unnecessary to insist upon a formal transfer of the said land to her, and persuaded and induced her to take no immediate steps for the purpose of enforcing such transfer.

9. The said John William Vance continued in ill health until the time of his death, and in consequence of his statements and representations hereinbefore stated, the plaintiff took no active steps to assert her rights to the said land up to the time of death of the said John William Vance.

10. After the said John William Vance had obtained the said certificate of title for the said land, he, without the knowledge or consent of the plaintiff sold portion of the said land amounting in all to 6 acres and 1 rood, and on the remainder of the said land he erected certain buildings.

11. On the 19th day of August, 1882, the said John William Vance died, having previously, to wit, on the 13th day of August, 1882, duly made and executed his last will and testament, whereby he appointed one Joseph William Evans, and one Thomas Makepeace, executors of his said will, and devised and bequeathed all his real and personal property to the plaintiff for life, and directed his said executors at her death to sell and dispose of his said property, and after payment of his debts and a legacy, to divide the proceeds into eight equal parts one of which was to be paid to each of his sons and daughters.

12. The said executors so nominated renounced the trusts of the said will, and administration of the estate of the said John William Vance with the said will annexed was on the 9th day of September, 1882, granted by this Honorable Court to the plaintiff, and on the 20th day of February, 1883, the defendant, John Macfarlane, was appointed trustee of the said will in the room of the said Joseph William Evans and Thomas Makepeace, as hereinbefore stated.

13. The plaintiff submits that the said will did not operate upon the land hereinbefore mentioned, and that the said John William Vance died intestate as to the same, and that the same is now vested in the defendant, the Curator of Intestate Estates.

The plaintiff claimed:—

(1). A declaration that the said land was acquired by the plaintiff for her separate use, and that the said John William Vance at the time of his death was a trustee of so much of it as then remained unalienated for her separate use.

(2). A declaration that the land descended to and became vested in the defendant, the Curator of Intestate Estates, as trustee for the plaintiff.

(3). A direction to the defendant, the Curator of Intestate Estates to transfer the same to her.

The defendant, John Macfarlane, by his statement of defence admitted the making of all the documents in the statement of claim mentioned and such of the facts therein mentioned as he deemed it unnecessary to deny, and as to the facts and circumstances upon which the plaintiff relied in order to obtain the declaration before mentioned he said that he was a stranger thereto, and put the plaintiff to proof thereof.

Griffith, Q.C., and *Byrne*, appeared for the plaintiff; *Rutledge* for the defendant, Macfarlane. The Curator of Intestate Estates did not appear.

Griffith, Q.C., submitted that the land in the claim mentioned was held by John William Vance in trust for the plaintiff and did not pass by his will, and he referred to *Jarman on Wills, pp. 693* and *697*, and cited *Dummer v. Pitcher, 2 M. & K., 262.* As to the nature of the evidence necessary to be produced in order to support the claim, he cited *Fowkes v. Pascoe, L.R., 10 Ch., 343; Marshall v. Crutwell, L.R., 20 Eq., 328; Ashworth v. Outram, 5 Ch. D., 938:* and as an authority to show that the houses which had been erected upon

granted by the Acting Chief Justice on the 23rd of May last, calling upon Francis Thomas Burke, to show cause why he should not stand committed to Brisbane Gaol for misbehaviour and contempt of court.

The Attorney-General appeared for the Crown, and with *Byrne* for the Queensland Law Association, to move the rule absolute.

Burke appeared in person.

From the affidavit of William Bell, Registrar of the Court, which was filed in support of the motion, it appeared that on the 14th May last, William Cahill, chief clerk in his office, handed him a letter which he said he had received from one James Stibbs, of Brisbane, baker. On the following day Stibbs called and told him that he had received the letter from Francis Thomas Burke. On the same day the latter came to deponent's office and stated that he had written the document and handed it to Stibbs. An affidavit by Stibbs set forth that he was insolvent, and that in the month of January last, Burke agreed to obtain his certificate of discharge on payment of the sum of £2 15s., of which £1 10s. was to be paid in cash and the balance when the certificate was obtained. He then paid him £1 10s. Subsequently deponent made frequent applications for his certificate to Burke, who replied either that the notice of the intended application had been too late for insertion in that week's *Gazette* or that the application had been adjourned till the next sitting of the court. In March last, at the request of Burke, he made an affidavit before Henry Buckley, accountant in insolvency, and on 13th April again applied for his certificate, when Burke handed him the following letter:—

Supreme Court, 12th April, 1883.

Mr. James Stibbs.

Re application for certificate of discharge.

The delay caused in the hearing of your application is owing the non-rendering of the report of Mr. Colin Munro, the trustee in your estate.

Mr. Munro has been cited to appear before His Honor Mr. Justice Pring, on Wednesday next, the 18th instant, to show cause why he should not be committed for contempt of court, and if his report on the estate is not then forthcoming your certificate of discharge will be granted to you.

By order of the court.

T. W. CARROLL, for Registrar.

This letter was handed by deponent to Mr. W. Cahill on the 14th May.

Burke, in answer to a question from the Bench, said the letter was not true. He added that he had nothing to say, that he was utterly ignorant that he was breaking the law. He had been for eight years off and on connected with the court, and would not knowingly do anything likely to bring it into contempt. Being asked in what way he was connected with the court, he said he had been assistant to the accountant in insolvency.

HARDING, A.C.J., said that was not being connected with the court, and would not help the respondent.

Burke said he had a wife and large family to support, and he was very sorry for what he had done. He had never been guilty of anything of the kind before.

HARDING, A.C.J.:—This case comes on upon the application of the Attorney-General and the Law Association, to make absolute a rule *nisi* granted on the 14th May, 1883, calling upon the respondent to shew cause why he should not stand committed to Brisbane Gaol for contempt in respect of certain matters mentioned in the affidavits of Stibbs and Bell. (His Honor stated the facts as given above). The remote connection which the respondent claims with the court is not recognised by the court, nor had he any right to use the address of the court. It seems to me very much like exercising or infringing upon the authority of the court and exercising functions which are entrusted by the court to its officers, and which are not exercisable by the outside public. That being so, it becomes necessary to deal with the matter. In a somewhat similar case, which occurred about two or three years ago, William Parminter was fined £20 and costs, and the Chief Justice in delivering the judgment of the court said it might be well for it to be known that if the offence was repeated the punishment might be much more severe. That foreboding must be carried out in this case, and in my opinion a fine of £20 should be inflicted, or imprisonment for fourteen days or until the fine is paid; if the whole term of im-

prisonment be served, then the fine will no longer be payable, and at no time is it to be enforced by execution. The costs of the rule will be payable by the respondent.

MR. JUSTICE PRING concurred.

Solicitor, *Crown Solicitor.*

Solicitor for Queensland Law Association, *Hellicar.*

FALBY *v.* EDWARDS AND OTHERS, JUSTICES, AND THE GOOLMAN DIVISIONAL BOARD.

Divisional Boards Act of 1879 (43 Vict., No. 17), secs. 53, 77, and 78, and the Divisional Boards Amendment Act of 1882 (46 Vict., No. 13), secs. 45 & 46.

MOTION to make absolute a rule *nisi* granted by Mr. Justice Pring, to restrain the respondents from proceeding upon or in respect of a conviction whereby the appellant was fined 1s., with 4s. 6d. costs of court, and £1 1s. professional costs, for carting timber in the Goolman Division without a license. The rule was granted on the ground that the by-law under which the conviction was made was *ultra vires.*

Griffith, Q.C., moved the rule absolute; *Garrick, Q.C.*, showed cause, and submitted that the Board had power to make the by-law; he quoted sections 53 and 77, and 78 of the *Divisional Boards Act*, and section 45 of the *Amending Act of 1882*, which repealed section 78 of the principal Act; *Maxwell on Statutes, p. 270*; *Galloway v. Lord Mayor of London, L.R., 1 E. & I., App. 134*; *Eastern Archipelago Co. v. The Queen, 2 E. & B., 879.*

Harding, A.C.J., called his attention to *Dickenson v. Fletcher, L.C., 9 C. P. 1.*

Griffith, Q.C., contended that the question of the power to make the by-law depended upon the construction of section 46 of the *Amending Act of 1882*, and that the Board had no power to impose a tax upon vehicles used by the owner for *Ex parte Marx: Chandos v. Commissioner for Inland Revenue, 6 Exch. 464* at *p. 479*; *Parry v. Croydon Commercial Gas Co., 15 C.B., N.S., 568*, at *p. 575.*

HARDING, A.C.J.:—This is a motion by Mr. Griffith, to make absolute a rule *nisi* obtained by him on the 28th May, from Mr. Justice Pring, calling upon the justices and the Goolman Divisional Board to shew cause why they should not be restrained from proceeding upon or in respect of a conviction made by them on the 18th April, whereby the appellant was fined 1s., and 3s. 6d. costs of court, and £1 1s. professional costs, for drawing timber on a public road with more than six bullocks, not having a license for the same. The rule was granted on the ground that the divisional by-law No. 3, under which the conviction was obtained, was *ultra vires* and invalid. The circumstances were that Falby with his waggon drawn by bullocks more than six in number and without having a license as required by the by-law No. 3, was driving it upon a road in that division. For this an information was presented against him by one Rawlings. When the matter came on for hearing, Mr. Cardew, who appeared for the applicant, objected to the by-law as being *ultra vires.* He contended that the Board had only power to license vehicles plying for hire, and that the Board had not the power to restrict the applicant's right to the user of the road by imposing upon him a license fee enforceable by a penalty. The by-law No. 3, as far as it relates to this case is as follows:—"No person or persons shall drive, or use, upon any public surveyed or proclaimed road in this Division, any waggon, dray, trolly, or other conveyance laden with any kind of timber (excepting sawn or split timber for his or their own use), and drawn by more than three horses or more than six bullocks, unless such conveyance is at the time licensed by this Board at the following scale," then follows the scale, "and for every neglect, breach, or offence of or against any of the provisions of this by-law, the maximum penalty shall be twenty pounds sterling (£20)." So that the by-law itself is penal, and it is purported to be made under the power contained in the *Divisional Boards Amendment Act of 1882.* Mr. Garrick quoted to us the 53rd, 77th, and 78th sections of the Divisional

Boards Act. The 78th section, under which Divisional Boards had power to make by-laws, is repealed by the 46th section of the Amending Act of 1882, except as to by-laws "which would have been valid if made under this Act." The 77th section gives the Board the power to impose tolls, rates and dues, but that power is restricted by the 46th section of the Amending Act. We were referred by Mr. Garrick to the 24th, 25th, and 30th sub-sections of section 46. Now I think that the party supporting a penalty must be able to show that there is express power to impose it, as pointed out by Mr. Justice Brett, in *Dickenson v. Fletcher*, *L.R.*, *9 C.P.*, at page 7. "We are called upon to construe a penal enactment. Those who contend that the penalty may be inflicted, must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty." But in this case, Mr. Garrick draws our attention to the various subsections and says it is somewhere there. Whatever power the Board may have to make this by-law as affecting other persons than the owner of the dray we express no opinion; but as regards a man using his own dray for his own purpose as was the case here, I think the by-law is *ultra vires*, and consequently the rule must be made absolute.

PRING, J.:—I think this by-law is *ultra vires* as against Falby, and that this case should be guided by the principle laid down in *Dickenson v. Fletcher*.

Solicitors for applicant, *Forton & Cardew*, Ipswich and Brisbane.

Solicitors for respondents, *Gill*, Ipswich.

IN CHAMBERS

PRING, J. 11th June, 1883.

IN THE MATTER OF PROCEEDINGS FOR LIQUIDATION BY ARRANGEMENT INSTITUTED BY J. H. BURNS OF BRISBANE, GROCER.

Insolvency Act of 1874 (38 Vict., No. 5), Sec. 77 and Rule 194.

An order may be obtained under Rule 194 on an *ex parte* application, and such application may be made immediately after the presentation of a petition for liquidation.

The facts sufficiently appear from the judgment.

PRING, J.:—This case came on for hearing before me in Chambers on June 1st, 1883, on the following notice of motion:—

In the Supreme Court of Queensland.

MR. JUSTICE PRING.

IN the matter of proceedings for Liquidation by arrangement or composition with creditors instituted by John Henry Burns, of Brisbane, in the Colony of Queensland, Grocer, trading under the name, style, or firm of J. H. Burns and Company.

TAKE NOTICE, that this Honorable Court will be moved before His Honor Mr. Justice Pring, at his Chambers in the Supreme Court, William-street, Brisbane, on Friday the first day of June, 1883, at ten o'clock in the forenoon, by Mr. Mein, solicitor, on the part of George Raff and Company, the plaintiffs in an action instituted in this Honorable Court against the above-named John Henry Burns, on the twenty-third day of May, now current, and numbered 395 of 1883, that the order of this Honorable Court may herein on the thirtieth day of May now current, whereby it was ordered that the said Messieurs George Raff and Company be restrained from further proceedings in the said action until the fifteenth day of June next, or until further order of this Honorable Court be set aside.

1. Upon the grounds that the said order was obtained *ex parte* and without any notice of the intention to apply for the same having been served on the said George Raff and Company.

2. Upon the further grounds appearing in and by the affidavit of Charles Stuart Mein, sworn and filed herein this day.

Dated this thirty-first day of May, A.D., 1883.

HART, MEIN AND FLOWER,

Solicitors for George Raff and Company.

To the above-named John Henry Burns, and to his solicitor, A. J. Thynne, Esq., Queen-street, Brisbane.

An affidavit of Mr. Mein was produced and read.

Mr. Mein in support of the notice of motion,

contended (as I understood) that the order appealed against could not be made until a trustee had been appointed, and cited section 202 of the *Insolvency Act, 1874*, sub-section 7. He further contended that under rule 38, notice should have been given of the intention to apply for the order in question.

Mr. Thynne, *contra*, referred to rule 194 and section 77 of the Act.

I made the order now sought to be set aside under the powers conferred upon the court by rule 194, which more particularly refers to proceedings for liquidation by arrangement.

It appears to me to be perfectly clear that the court has power to entertain applications of this kind *before* a trustee has been appointed under a liquidation by arrangement—see *Ex parte Isaac, In Re De Vecchi, L.R., Ch. App. vol. 6, p. 66; Ex parte Key, In re Skinner, L.R. 10 Eq. p. 452.* With regard to the ground of objection particularly set forth in the notice of motion, I may state that I think that rule 38 does not apply to rule 194 under which this order was granted. Sir W. M. James, L.J., in delivering his judgment in the case of *Ex parte Isaac, In re Vecchi*, says:—"This (referring to the nature of the proceedings) was done under the 260th rule" (English, identical with rule 194 of *Insolvency Act 1874*), "which we must take to be an authoritative decision, that it is in the power of the court to entertain these applications *immediately* after the presentation of the petition for liquidation." I may point out that in the case first cited the order for an injunction was made on notice of motion, whilst in the latter case the order was made *ex parte*, and on being appealed from was *affirmed* but without costs on the ground that no notice had been given to the execution creditor. The 77th section of the *Insolvency Act of 1874*, differs from the 13th section of the English *Bankruptcy Act 1869*, in this respect, viz., that it provides that applications may be made under it *ex parte*. Rule 194 however does not contain such a provision. Considering however the remarks of Sir W. M. James, L.J., in *Ex parte Isaac, In re De Vecchi*, and noting the case of *Ex parte Key, In re Skinner* (in which case an *ex parte* order had been made, and on being appealed from was affirmed), and following the hitherto undoubted practice of the court, I am of opinion that the order appealed from was rightly obtained on an *ex parte* application under rule 194 of the *Insolvency Act of 1874*, and that such application may be made immediately after the presentation of a petition for liquidation. Cases however may arise in which it may be advisable that such an application should be made on notice of motion. See *Ex parte Key, In Re Skinner.*

The notice of motion will therefore be dismissed with costs.

Solicitors for Raff & Co., *Hart, Mein & Flower.*
Solicitor for Burns, *Thynne.*

HARDING, A.C.J. 23rd June, 1883.

AHERN v. CENTRAL QUEENSLAND NEWSPAPER COMPANY.

11 Victoriæ, No. 13, sec. 13.

The 13th section of the *Defamation Act* (*11 Vict. No. 13*) does not give the party injured a remedy *in rem*. The person whose types, presses, or printing materials may be seized is some person other than the defendant on the record; and, therefore, where the defendant in an action of libel published in his newspaper, sold his types, &c., before judgment to a *bonâ fide* purchaser for value with notice, the types, &c, are unaffected. *Webb v. Humphrey, 6 N.S.W. Sup. Court Rep., 361*, followed.

The cases cited were:—*In re Poole Firebrick Co., L.R., 17 Eq., 268; In re Sablonière Hotel Co., L.R., 3 Eq., 74; Webb v. Humphrey, 6 N.S.W. Rep. 361; In re Bridport Old Brewery Co., L.R. 2 Ch., 191; In re Silkstone Fall Colliery Co., 1 Ch. D., 38; In re Home Investment Co., 14 Ch.D., 167; Bailey & Leetham's Case, L.R., 8 Eq., 94.*

The facts are sufficiently set out in the judgment.

HARDING, A.C.J.:—In this case, the plaintiff on the 23rd of August, 1882, issued a writ of summons against the defendants in an action for defamation. Subsequently proceedings were taken to wind up the defendant's company voluntarily, which on the 8th December, 1882, resulted in the passing of a resolution to that effect, and that Robert Sharples, should be appointed liquidator. The action came on for trial on the 21st April, 1883, when the plaintiff obtained a verdict upon which judgment was signed on the 7th May, 1883. Between the

passing of the resolution and the verdict, property of the company, consisting of the types, presses, and printing materials which were used in printing the defamatory matter, were sold and delivered for value by the liquidator, to William Herbert Robison, who appears to have had ample notice of the proceedings in the action. Under these circumstances the liquidator has applied to me to restrain the plaintiff from issuing execution on his judgment against the property of the defendant, and has procured the appearance on the hearing of his application of the plaintiff and Robison. The liquidator being represented by Mr. Garrick, Q.C.; the plaintiff by Mr. Griffith, Q.C., and Mr. Virgli Power; and Robison, by Mr. Prior, who took no part in the argument. No serious contention was raised as to the defendants' right to restrain the execution against the defendants' property, other than that consisting of types, presses, and printing materials. Mr. Griffith raised the objection that the affidavits did not show that the resolution had been properly carried. I think they made a *prima facia* case, and that thereupon the onus lay on his side to show that the resolution was invalid. The real question in the case arose on the construction of the 13th section of 11 Vic., No. 13, *The Defamation Act*, which is in the following words:—" And be it enacted that whenever any person shall be convicted either in a civil or criminal proceeding of printing or publishing a defamatory article the plaintiff or prosecutor in whose favor judgment shall have been given, shall be at liberty under his writ of execution to levy the costs damages penalty and expenses named therein out of the whole of the types presses or printing materials whatsoever belonging to the person whose types presses or printing materials or any part thereof may have been used in printing such defamatory article as well as out of the property of the defendant on the record." Probably the true construction of this section is well represented in its marginal note which is as follows:—" Plaintiff having obtained judgment may levy costs, &c., out of types, &c., used in printing defamatory article as well as out of the property of the defendant on the record." Whether or not the type, presses, or printing materials of the defendants used in printing the defamatory matter are affected by the institution of an action as in a proceeding *in rem*. appears to me unnecessary to be further decided than to hold as I do that at all events they are not so affected until judgment, and I very much doubt if they are even then until actual injury. In the present case the property having been sold and distributed before execution they are unaffected, and the application must be treated as an ordinary application to restrain a creditor proceeding with his execution after a winding-up has commenced thereby disturbing the distribution of the assets *pari passu* amongst the creditors. The order will therefore go, but as the ascertainment of the damages was necessary and was defended out of and for the benefit of the general assets of the company the plaintiff should be allowed his costs of the action up to the issuing of the summons in the present application. The formal order will be: Let the plaintiff be restrained from issuing execution against the property of the defendants on the judgment of the 7th May: Let the plaintiff be paid in full his costs of the action up to the issuing of the summons in this present application out of the assets of the company in priority to the costs of the winding-up: Let the plaintiff be at liberty to add all his other costs in the action to his debt and to prove therefor in the winding-up, and receive satisfaction thereof out of the property of the company *pari passu* with the rest of its liabilities: Let the costs of the respondent Robison be paid by the liquidator, and let the defendants have such costs and their costs of this application as their costs in the action: Let the plaintiff have his costs of this application as his costs in the action.

Solicitors for liquidator and Robison, *Rees, Jones & Brown*, Brisbane and Rockhampton.

Solicitor for plaintiff, *Chambers:* Agent for *Lyons & Brumm*, Rockhampton.

IN CHAMBERS.

PRING, J. 9th July, 1883.

Re WINTER, VEALE & CO. *Ex parte* ALEXANDER RAFF AS OFFICIAL ASSIGNEE OF PITTS AND WINTER, AND *The Trustees and Incapacitated Act v.* TRUSTS OF A CONTRACT FOR DISSOLUTION OF PARTNERSHIP OF WINTER, VEALE AND CO.

Griffith, Q.C., with him *Ringrose*, applied under section 34 of the *Trustees and Incapacitated Act*, for a vesting order for portion 1 containing 20 acres situated in the county and parish of Clermont, and 1 acre being allotment 5 of section 28 situated in the county and parish aforesaid, and town of Clermont, in favor of Alexander Raff as official assignee of the estate of Pitts & Winter.

The facts proved were, that prior to and in the year 1865, Pitts, Winter and Veale, carried on partnership together at Clermont, under the style of "Winter, Veale & Company." In the year 1865, the partnership was dissolved by Veale retiring therefrom or selling all his interes in the assets of property to his partners Pitts & Winter, for valuable consideration.

That part of the partnerships assets and property, at the date of dissolution, was the land referred to, which were registered under the *Real Property Act* in the names of Pitts, Winter & Veale, as tenants in common.

No deed of dissolution of partnership was executed in any conveyance or assignment of Veale's interest in the partnership assets and property in the said lands to Pitts & Winter.

Veale shortly after such dissolution left the colony, and has never returned, and his whereabouts have not been discovered.

Pitts and Winter after the dissolution carried on business together as "Winter and Company" till on or about the 23rd of February, 1866, when they were duly adjudicated insolvent, and Raff appointed Official Assignee of their estate.

At the time of the insolvency the said lands and hereditaments still formed part of the assets of "Winter & Company."

The said lands were from September, 1864, and still are, subject to an equitable mortgage in favor of the A. J. S. Bank.

Transmission of Pitts & Winter's estate has been duly registered to Raff, as such Official Trustee, in the books of the Registrar-General.

Order—that the said William Edward Veale is seized or possessed of his one undivided third share or interest in the said lands and hereditaments as a trustee for the said A. Raff, as such Official Trustee within the meaning of the *Trustee and Incapacitated Persons Act of 1867*, and that the said one undivided share or interest of the said William Edward Veale in the said lands and hereditaments be vested in the said Alexander Raff as such Official Assignee for all the estate or interest of the said William Edward Veale therein, if now living, or if he be dead, for the estate therein which would now be vested in the said William Edward Veale if he was living.

Solicitor for applicant, *Winter*.

PRING, J. 20th July, 1883.

NORTH BRITISH FIRE INSURANCE CO *v.* SCOTTISH IMPERIAL FIRE AND LIFE INSURANCE CO.

PRING, J.:—In this case, Mr. Jones, (from Messrs. Hart, Mein & Flower's office), on behalf of defendants obtained an order *nisi*, calling upon the plaintiffs to shew cause why the writ of summons issued by the plaintiffs for service out of the jurisdiction should not be set aside for want of jurisdiction. Mr. Garrick, Q.C., appeared in support of the rule; Mr. Real, appeared to shew cause. Mr. Real raised a preliminary objection:—That the defendants have no *locus standi*, not having entered an appearance. He cited *Fowler v. Barstow, 20 Ch. D., 240.* Mr. Garrick contended that the issue of the writ was irregular, and that if an appearance was entered the irregularity would be waived. He cited *Dramond v. Sutton, L.R., 1 Ex. 130; Preston v. Lamont, 1 Ex. D. 361; Cookney v. Anderson, 1 De G., J. & S., 365;* and *Bouet v. Picot, 28 L.J., Ex. 244.*

I am of opinion that this objection cannot be sustained. Under the Judicature Act in force in this colony it is not necessary to obtain the leave of the court or a judge for the issue of a writ of

summons for service out of the jurisdiction. The Colonial Act differs in this respect from the English Act. The plaintiff, as it appears to me, issued his writ out of the jurisdiction at his own peril, and when service of the same had been effected I am of opinion that the defendants were at liberty to come in and move to set aside the writ and the service without entering an appearance. The entering an appearance to the writ would, it appears, have operated as a waiver to its validity. *Forbes v. Smith, 24 L.J., Ex. 167.* It being admitted by Mr. Real that the writ was improperly issued, unless leave be given to amend, and such leave being refused by me, the rule, therefore, will be made absolute with costs.

Solicitors for plaintiffs, *Roberts, Roberts and Bernays.*

Solicitors for defendants, *Hart, Mein & Flower.*

ROXBURGH *v.* TULLY.

Claims against the Government Act, (20 Vict., No. 23), Crown Lands Alienation Act of 1868, secs. 45, 53, 54, 57, 126.

Where a contract involves in its performance the making of the declaration, "I live in Queensland," and when that declaration is untrue and wilfully made, such contract is void and cannot be waived or revived or confirmed afterwards, except as a *de novo contract.*

THIS is an action brought by the widow and executrix of John Pirie Roxburgh, against the Government of Queensland, under the provisions of the "Claims against the Government Act." The said Government appointed William Alcock Tully, to be named defendant under the provisions of the said Act, and Eyles Irwin Caulfield Browne, a solicitor, to whom probate of the will of the said John Pirie Roxburgh was granted in this colony, was also joined as a defendant. The plaintiff, by her statement of claim, sought a declaration that she was entitled to have a deed of grant in fee simple of certain land taken up by the said John Pirie Roxburgh under the provisions of the *Crown Lands Alienation Act of 1868*, of issued to her, and in that the said Government might be ordered to issue such grant; and she also prayed for specific performance to the said Government.

The facts appear sufficiently in the judgment.

Griffith, Q.C., (Feez with him), appeared for plaintiff; and *The Attorney-General, Garrick, Q.C., Real* and *Prior*, for the defendant.

Griffith, Q.C., cited *Fisher v. Tully, 3 App. Ca. 627*, and submitted, that this case differed from *Fisher v. Tully*, in that the fact of the non-residence of the selector in this case was brought to the actual notice of the Minister for Lands before the Commissioner approved, and the said Minister confirmed with full notice. He further submitted that the residence of the selector at the time of making the application was not a condition or covenant of lease, but a matter of qualification. The Government could disaffirm the contract. If it was a condition or covenant it was one which was broken once for all, and if the Government after knowledge ratified the contract they waived all right to refuse to issue a grant. Whether it was regarded as a matter of covenant or misrepresentation the lessor could elect to affirm when he had knowledge of the facts, and that he did so. *Morrison v. Universal Insurance Company, L.R., 8 Exch., 197.* He submitted that the only question was whether the Government could waive such a fraud or illegality, or breach of law? *Fisher v. Tully, supra.* He referred to sections 53, 54, and 57 of *The Crown Lands Alienation Act of 1868.* He called evidence to prove the allegation of fact contained in the statement of claim.

Griffith, Q.C., having closed the plaintiff's case, *The Attorney-General* applied for a nonsuit on the grounds that:—(1). There was no statutory contract as the said John Pirie Roxburgh never lived in Queensland. (2) That the said John Pirie Roxburgh had not complied with the provision of section 57 of *The Crown Lands Alienation Act of 1868.*

Garrick, Q.C., followed, and submitted that this case differed from *The Queen v. Davenport, supra*, in that in *The Queen v. Davenport*, the Crown commenced an action for ejectment. He contended that the doctrine of waiver did not apply to the Government, and if this could be

waived on the part of the Government, such waiver must be by the Governor-in-Council.

Real followed on the same side.

Griffith, Q.C., replied.

HARDING, A.C.J., refused to nonsuit.

The Attorney-General called evidence to prove that there was no knowledge on the part of the Government, and therefore no waiver.

HARDING, A.C.J.:—This is an action by the widow and executrix of John Pirie Roxburgh, against the Government of Queensland, represented by William Alcock Tully, and against E. I. C. Browne, solicitor, to whom probate was granted in this colony. She seeks by her statement of claim a declaration that she is entitled to have a deed of grant in fee simple of the said lands issued to her; that the Government may be ordered to issue such grant; and for specific performance.

Now, her husband, John Pirie Roxburgh, was, at all the times I shall mention, up to the time of his death, a solicitor, a member of the firm of Roxburgh, Slade & Spain, carrying on business in Sydney, in the Colony of New South Wales. In September, 1868, he visited Queensland; the objects of his visit would scarcely affect the case, but he brought with him Mrs. McLean, the widow of the deceased partner in Westbrook Station, the firm having been McLean and Beit, and he was her legal adviser. He came up with her and they visited Toowoomba, at which place the Commissioner for Crown Lands for the Darling Downs had his office, and they visited together Westbrook Station upon which the piece of land in question was selected. On the 25th September, he made an application to be allowed to select certain land on Westbrook run. He acted with a certain amount of caution in making the application, for it involved making the statutory declaration to the effect that he lived in Queensland. With reference to that it appears that before he lodged it he invited the opinion of the Land Commissioner as to whether he would reject his application as he had not previously lived in Queensland; he was told that the application would not be rejected for that reason, but he did not take the trouble to tell the Commissioner that he did not intend to reside here. The application was subsequently approved by the Commissioner on the 10th October, 1868, and at that time the Commissioner, (Mr. Gregory), appears to have known the facts I have stated, that he was a solicitor in practice in Sydney, but nothing as to his future intentions; he had merely his application and such information as was given to him by the question whether he would reject his application he not having resided in Queensland. With that knowledge he approved of the application, which was subsequently confirmed on the 10th August, 1869, at which time Mr. Taylor was the Minister. Between the time of the application and that time Sir Arthur Palmer and Mr. Macalister had been Ministers, and there had been a conversation between Mr. Macalister and Mr. Gregory as to Mr. Roxburgh's case, Mr. Gregory having called attention to the fact of his not being resident in Queensland. The result was that the Minister instructed him that he had no power to take any action because he had no proof that he did not intend to come and reside in Queensland. The Minister evidently did not think that an unreasonable time had taken place to enable Roxburgh to act upon any determination to live here which he might have had in his mind when he made the declaration. Now that conversation must have taken place before the confirmation of the 10th August, 1869, about eleven months after the application, and of course as regards the waiver the one question to consider would be whether a reasonable time had elapsed for Roxburgh to carry out any intention he had with regard to residence, and whether the Government might still reasonably suppose that that he was making preparations to come and reside in Queensland. The lease was issued in November, 1869, and afterwards on the 13th April, 1871, the Commissioner's first certificate was granted; the second certificate being issued on the 4th July, 1876. Mr. Taylor was Minister from January, 1869, to May, 1870, and the matter appears to have been brought up before him.

Mr. Gregory says that he is quite sure, and distinctly recollects that on several occasions the question of Roxburgh's application was discussed. In answer to that Mr. Taylor admitted the goodness of Mr. Gregory's memory, and that as long as his own memory did not clash with it that he would give credit to it, but he says he has no recollection of the conversations. As to these conversations Mr. Taylor's memory seems to be a void, and probably he is accurate in his statement that he remembers nothing at all about it. Mr. Gregory's evidence shows that during the time Mr. Taylor was Minister, the whole matter was discussed between them. The next thing done was the issue of the Commissioner's certificate, and in addition there was on each of these occasions the yearly receipts of rents, therefore the whole of the circumstances of the case would probably be known at that time, and probably reasonable men would consider that between the 25th September, 1868, and 30th April or March, 1870, a reasonable time had elapsed for Roxburgh to carry out his intention to live in Queensland if it had existed, and the proper time had arrived for the government to make an election, if the contract was voidable, a reasonable time had arrived to avoid it, and if there were sufficient circumstances to confirm the contract it should have been confirmed. Subsequently, which would be a further act of confirmation, further receipts for rent were given, the balance of the rent was paid and applications for a grant were made from 1876 to 1879. It appears that the grant was actually refused in July, 1876, but the plaintiff does not seem to have done anything, the refusal seems only to have excited general uneasiness until 5th February, 1879, when he asks for the deeds by letter, and on the 22nd he got the information that the Executive Council had decided that no deeds were to be issued; he then made further applications which have not been successful. Under these circumstances, the original selector having died, his widow brings this action. The sections of this Act, *The Crown Lands Alienation Act, 1868*, have probably been as prolific of litigation as any statute on our books, happily it has been repealed, or it might have attained as much notoriety as the *Statute of Frauds*. A number of sections have been referred to and I will go through them and give the views I take of their construction. The matter arises under the clauses relating to leases by selection. The first which it is necessary to mention is the 46th, which defines the manner in which lands are to be acquired. "Any person (except as hereinafter excepted) "—that probably means there are some exceptions "may"—it is still optional—"on any office day during office hours, tender to the commissioner or land agent for the district an application in the form contained in schedule E of this Act, for selection of land within any area proclaimed as open for selection aforesaid." As was pointed out by Mr. Garrick, the form in schedule E is in the nature of a double form; it contains an application and declaration, so that so far all that Roxburgh had to do was to make the application. A further section in the Act, the 53rd says:—"On making application for any land under the foregoing clauses of this Act a conditional purchaser shall be required to make a solemn declaration to the effect contained in schedule E," so that contemporaneously with the application he had to make a declaration, part of which is "that I declare I live in Queensland." I will come back to the meaning of these words later. Every person who makes application for land is to do it in form E, and excepting certain persons mentioned in the proviso to section 53 every person is to make a declaration; the persons who are not to make the declaration are as follows:—"Conditional purchases or selections of land made by a pastoral tenant to secure his homestead on improvements on the resumed half of his original run, or to secure his improvements on the leased half as provided by this Act," persons who by the laws relating to such matters were not bound to reside in the colony at all. It is perfectly manifest that there are a great number of persons who might make this declaration but who would be undesirable tenants, these persons

are excepted by the 54th section, they are an "infant or a married woman not having obtained a decree for judicial separation, or an order protecting her separate property binding in Queensland, or who is not a natural born or naturalized subject of Her Majesty." At the same time the section says:—"Provided always that if any person shall in violation of any of the provisions of this section become the lessee or assignee of any land under the above provisions the Governor may declare the lease to be forfeited." So that in the same section the law says that certain persons shall not become selectors, and yet recognises the fact that they may become, and if they do become, the Governor may declare the lease forfeited, thus showing that the Governor had a discretion to retain such lessees or not. There is yet another class of persons who may make the declaration, but who if they do, make it falsely, and it was desirable to give the Governor power to except them although they became tenants the same as infants, &c., they would probably be included therein, and the Governor would be empowered to decline to accept them as tenants, but they are from the power and construing the meaning by that argument one would be driven to the conclusion that these persons were not to be accepted as tenants at any price. In addition to that there is this circumstance which goes to the status, qualification, or capacity of the applicant as a contracting party. For the 126th section provides that: "Any person who shall wilfully make a false statement in any declaration made in pursuance of this Act shall be guilty of perjury." I think the authorities on that point are very clear. Lord Hatherley, *In re Cook and Youghal, L.R., 4 Ch., 758,* said: "Any contract which involves in its fulfilment the doing of an act which is prohibited by statute is void, and as a general rule, everything in respect to which a penalty is imposed by statute must be taken to be a thing forbidden. Consequently, if a contract involves in its performance the doing of anything which is rendered penal by statute the contract will be void." This contract involved in its performance the making of the declaration "I live in Queensland," and when that declaration is untrue and wilfully made, it is declared to be a crime, and according to my construction the due necessity of the truth of the declaration is enforced by a criminal punishment, penally, consequently all contracts in which the declarations are not true are void, and contracts which are void cannot be waived or revived or confirmed afterwards except as *de novo* contracts. So that goes further to prove the argument that it was a matter of status, qualification, or capacity. If the contract made by these persons was embodied in the terms of the contract it would be void, so that I take it it is a case of status or void contract. The next thing to consider is how far I am concluded and bound by authority, because if my view conflicts either with the Full Court here or the Privy Council I must bow to it, however strong my opinion may be. We have little help from the case of *Fisher v. Tully, 3 App. Cases, 627.* First their Lordships there went through the sections of our Acts and the facts of the case, and concluded that they were driven to the conclusion, agreeing with the judges of the Supreme Court here, that the declaration was untrue. (The first thing for them to determine was whether it was a question of status.) They next went on to ascertain whether it was made with a *bonâ fide* belief in its truth. The whole paragraph runs as follows:—"Then could the appellant have himself believed in its truth? Could he have mistaken the sense in which the word 'live' was used in a declaration of this kind? In their Lordships' view it is impossible to suppose that a man of ordinary intelligence could so far misunderstand the meaning of the word as to believe that short and transient visits to the colony, which is the utmost that has been shown to have occurred, would satisfy it. The facts were entirely within the personal knowledge of the appellant, and if sheltering himself, it may be, under some assumed uncertainty of the meaning of the word 'live,' he chose to make the declaration without a *bonâ fide* belief in its truth, that would con-

stitute such misrepresentation as would in law defeat the contract, provided it is established that the declaration was of a material matter, and one of the inducements for entering into it." Now I have already indicated a case in which a man might be so overcome by the beauties of the country, the desirableness of the climate, and the facilities offered for acquiring wealth, that he might at once determine to throw up all he had done in the past, and in the future to live here. A man who had made such a determination would probably make some steps to fulfil it, or he might change his mind, but if he *bonâ fide* believed at the time in his intention it is impossible to say that it was not true. But in the present case we find he left the colony immediately afterwards, never coming back, and appointing a permanent agent in the colony, Mr. Gregory, who has managed the estate. So that as far as we can have evidence to shew the intention of a man I should say that he never did "live in Queensland." If he made this declaration in the *bonâ fide* belief in its truth one would have expected a man when asking a question as to whether his application would be rejected, to say something as to the future, as for instance, true I have not lived here but I am going to settle upon such and such a place, but he did nothing of the kind, he speaks only of the past. Then there is the evidence of Mr. Taylor, as to what took place when he charged him with having committed a wicked act. Roxburgh referred to the case of executors in New South Wales, and said that as executors living outside of the colony had to give a double bond, they went and lived there for a short time, and that was held by the judges to relieve them from the necessity of giving the additional bond. Because he had seen other people do an illegal act to avoid certain unpleasant consequences, he thought he was able to justify himself, not because he had made the declaration in the belief that it was true, but because others had done the same thing before. Mr. Taylor said: "He said he believed himself justified, and I told him he was not." I find, therefore, that Roxburgh did not live in Queensland, and that he did not *bonâ fide* believe in the truth of the declaration which he made. If I am right there the plaintiff is not entitled to succeed, if it is a void contract he is not entitled. The Privy Council in the case of *Fisher v. Tully* went on and reasoned the case out, they held that "the declaration was not only a material matter, but that it formed one of the bases on which the contract was founded." They found further that no question of waiver or of election to affirm the contract arose in the case, there being an entire absence of evidence that the officers of the Government knew that the declaration was untrue either at the time the lease was granted or the rents received. Their Lordships said: "Further, it may be gathered from the general scope of the Act that residence in the colony was meant by the Legislature to be an essential qualification of applicants for lands of the class selected by the appellant. The object was to encourage and obtain settlers in the colony." I take it that by qualification they meant capacity to contract, and that the rest of the judgment was as we often find where there is a short and straight way, they took that short way, they left open the question relating to fraud and waiver. I take it that if this case were before them and they were bound to follow the decision in *Fisher v. Tully*, their decision would be that to which I have arrived, and nothing remains for me but to dismiss the action.

Solicitors for plaintiff, *Hart, Mein & Flower.*

Solicitor for defendant, *Crown Solicitor.*

ROXBURGH *v.* TULLY.

Application for Costs.

The facts appear from the judgment.

HARDING, A.C.J.:—This is a motion moved by Mr. Garrick, with Mr. Real, for an order that the plaintiff pay the defendant's costs in the action, or for such order as the Court may think fit. The motion was opposed by Mr. Griffith, and Mr. Feez. The necessity for the motion arose by reason of nothing being said by me in delivering judgment in this case a few days since. It has been con-

tended that the judgment as delivered is complete, and if it is complete, I have no power to alter it. That a judge of first instance cannot alter his decision except in some few cases, which are, if he uses language which is capable of two meanings, or if the judgment is capable of being construed in more than one way, or if he gives a judgment in general terms which are supposed to have acquired a known meaning, and a dispute arises between the parties as to what is meant, but having once delivered his judgment, and it is complete, he cannot alter it, that is the function of the Court of Appeal. Now is this judgment complete? The forms of all judgments of this court provide that where the costs are to be paid by one party to the other they have to be ordered by the court, where they have not to be paid by one party to the other there is no mention in the order. But technically, the order is complete, unless it conveys what it was not intended to convey, but to my mind it could not. Upon the conclusion of the case I think it is open to the parties to apply to the judge if he does not dispose of the matter in his judgment, and if he does not it is a certain intimation to the parties that it is open to argument. Then somebody must make an application, and a few concise propositions are always allowed to be adduced by the different sides, and that is the time when costs should be asked for. After the order is complete, I do not think the parties can obtain a substantive order for costs. In this case, I had shewn from the statement of facts, which I had made, that there was a serious question of costs, and that there was a good deal to show that the usual rule the judges follow—rules of practice only—that costs follow the event—might not be followed. In order to give the parties an opportunity to alter the judgment I delivered, I waited here and allowed ample time for the subject to be mentioned, but nothing was said on either side. Mr. Griffith says, "I did not mention it because I thought the order made was as good as I was likely to get." Mr. Garrick says he did not mention it because before The Chief Justice, Sir Charles Lilley, some intimation was given, that where he did not mention the matter, the successful party would get his costs. But that is only the intimation of a single judge and I have not heard that it has become a matter of universal practice, and cases show that at home the practice of one Division does not run in the others. I felt that the matter with respect to the defendant stood in such a peculiar position, that if it was necessary I would not open my mouth to give him costs, but if by my saying nothing he could get costs, the law might take its course, and I left the matter to be decided upon the rule, but I would not say anything in this particular case. If there is a specific rule giving him his costs he will get them; if no specific rule the matter must take its course. These being the facts upon which the matter stands, and my judgment being against the motion on both the grounds, I think the judgment was complete; therefore, I have no power to alter it; and I think that a proper discretion was exercised. That being the case, the motion must be dismissed with costs.

Solicitors for plaintiff, *Hart, Mein & Flower.*

Solicitor for defendant, *Crown Solicitor.*

FULL COURT.

7th August, 1883.

BUCKLAND *v.* CROMBIE.

Practice—Appeals from Northern Circuit Court.

Griffith, Q.C., Real with him, appeared for the plaintiff to move absolute an order *nisi* granted in this case.

Garrick, Q.C., Power with him, appeared to shew cause.

Garrick, Q.C., raised a preliminary objection, to the effect that the present motion should have been made before the Northern Judge. The case had been tried at Charters Towers by Mr. Justice Cooper, under an order of Mr. Justice Pring, for the hearing to take place there; and he submitted that that order amounted to a transfer of the proceedings to the Northern Court, and had been treated by that Court in that light

Griffith, Q.C., argued that the case had been

submitted merely for trial to Mr. Justice Cooper, who was a Judge of the Supreme Court of Queensland, and tried the case in the same way as any other Judge would have tried it on circuit.

HARDING, A.C.J.:—Before proceeding to the merits of this motion it is necessary to dispose of the preliminary objection taken by Mr. Garrick to the jurisdiction of this court. It may be well to go into this matter with some minuteness, as it is a question of considerable importance in the future. The matter arises thus: An action was instituted in the Brisbane Registry of the court by Buckland against Crombie, the matter proceeded and a statement of claim was delivered, which, from the argument, I assume, laid the venue at Charters Towers. The pleadings went on until ready for trial and the sittings at Charters Towers were imminent, then the opinion was entertained, probably by both parties, that in order that the trial of the cause should take place at Charters Towers, it was necessary that the judge to whom the cause was assigned should direct the action to be tried there, and accordingly the parties appeared before Mr. Justice Pring, and by consent, he ordered that the trial of the action should take place before the Circuit Court, at Charters Towers. That order I consider was of no validity whatever. Either parties had the right to try it without the order, if they had the right the order gave them, nothing further. Then the action was entered for trial and the papers, that is the copy of the pleadings, were forwarded to the Registrar at Bowen with this order. If the papers were not accompanied by an order transferring the matter to Bowen, the Registrar there was only the agent of the Registrar here to deliver them to the associate of the judge. The action came on for trial at Charters Towers, and was heard before Mr. Justice Cooper, the Northern Judge, and upon the trial he directed a certain judgment to be entered. Under these circumstances the plaintiffs were dissatisfied with that judgment in part, and came here and obtained a rule *nisi* for a re-assessment of damages which was made returnable to-day, and to that rule this preliminary objection has been taken, that this court has no jurisdiction until the matter has been heard before Mr. Justice Cooper, sitting as the Appeal Court by himself, and then coming here as an appeal from him. So far as I read these statutes they constitute a Supreme Court of Queensland, which has certain powers which can only in the first instance be exercised by three judges; then the Supreme Court Act goes on to say that in certain cases one judge sitting alone shall be capable of exercising certain of those powers—for example, in Equity, in Insolvency, and in Ecclesiastical matters. So that what is called the Supreme Court is the Supreme Court sitting at Brisbane, constituted of three judges. These justices of the court may exercise certain limited powers sitting alone, and in addition to that, the Supreme Act of 1867 has constituted circuit courts throughout the colony, which courts were to be presided over by a justice of the Supreme Court. That was the law before Northern judge was appointed, then the Supreme Court had jurisdiction all over the colony. Since that the Supreme Court Act of 1874 has been passed by which the Northern judge was appointed, and his district defined. There is nothing in that Act which takes away the jurisdiction of the Supreme Court sitting in Brisbane, but it takes out of the colony a certain district and places there a Northern judge who it says by the 16th section "shall have all the powers and jurisdiction of the court as conferred by this Act, and *The Supreme Act of 1867*." That is to say, within that locality he sitting alone shall have the same jurisdiction as the Supreme Court here, composed of three judges, and sitting alone, shall also have the several jurisdictions the judges have here, but only in his locality, at the same time not interfering in any way with the jurisdiction of this Court. He has the jurisdiction of the Supreme Court, but he is located within certain limits, and so long as he is located within those limits and bears the title of Northern Judge his functions are limited to those limits, as I understand the judgment of this court upon a pre-

vious occasion. These circuit courts are constituted for the trial of actions, and the place of trial being determined as soon as the matter is at issue and ready for trial, the issue should be delivered by the Registrar to the Associate of the judge who presides at those sittings. All through the colony the judges of the Supreme Court who sit at Brisbane have the power to sit. As regards the Northern judge it is only necessary to say that he has ample power to try anything there; it is not necessary to say further than I have already done whether he has jurisdiction to try anything outside that district or not, without some alteration of his *status*; and no doubt it is his duty as presiding judge of the Circuit Court of the district to try all actions sent there for trial. As soon as the action has been tried by him at the Circuit Court, the record, that is to say, the copy of the pleadings is to be returned to the office from which it came, to which it is attached, and if it is attached to the Brisbane office it should be sent there, if originally filed in the Bowen office it should be returned to that office. Then, in that district to which it comes back the motions for new trials or matters of a like nature should be had. In this case the action was commenced in this court, the proceedings were laid in this court, the issue was sent from this court, it has been tried in the Charters Towers Circuit Court by a judge having proper jurisdiction, and consequently should be returned to this court. I think this court is the court to which applications of this nature should be made, so that as far as I am concerned, the objection is overruled.

Pring, J.:—I am of the same opinion. I think that a person residing in the Northern district has a perfect right to chose in which court his action shall be brought. In this case the plaintiff brought his in the Supreme Court of Queensland, an appearance was entered to it, and proceedings were carried on in Brisbane. The venue was laid at Charters Towers, and Charters Towers being a Circuit Court town, and the venue being laid there, it was a proper town in which to determine the issue. The trial having taken place, the record having been sent up to the Registrar at Bowen constitutes him the agent of the Registrar here. I say nothing about my order, I look at it as valueless. The record having been sent from here it should be returned to the Supreme Court in Brisbane, and any after proceedings must be taken here. The Supreme Court has jurisdiction throughout the colony, and the Northern judge's jurisdiction is limited to the Northern districts. I am also of opinion that no order for the trial of the action at Charters Towers was necessary.

Solicitors for plaintiff, *Daly & Hellicar.*

Solicitors for defendant, *Rees R. Jones & Brown*, Brisbane and Rockhampton.

BUCKLAND & CO. *v.* CROMBIE & CO.

Where in an action for breach of contract the plaintiff sues before the time of completion, the rule of damage is the same, as if the breach had happened at the end, with this difference, that if it had happened at the end, and there had been a market, in which goods of the kind could have been readily bought, the damage could be measured by the excess, if any, of the market price, at which such goods could have been bought, over the amount of the contract price at the time of the breach.

Where there is no market, in which the goods are readily obtainable, then the measure of damage is the amount of loss which may be expected in the ordinary course of things to follow from the non-completion of the contract and to be the natural consequence of it.

Remarks on the practice of referring to the judge, who tried the case, before granting a new trial.

This was a motion to move absolute a rule *nisi* to shew cause why the findings of the jury as to damages should not be set aside and a new assessment of damages had between the parties, on the ground that the verdict was against the evidence, and that the damages were inadequate.

The facts appear sufficiently in the judgments of the Court.

Griffith, Q.C. (*Real* with him), for the plaintiffs, moved the rule absolute; *Garrick, Q.C.* (*Power* with him), for the defendants, in showing cause said, that the action was commenced in November, 1882, but the time for performing the contract extended up to the 31st of March, 1883. He submitted that if a plaintiff brought an action for

refusal to perform a contract before the time for its completion had arrived he was only entitled to nominal damages for non-delivery of the articles bargained for, and any expense or trouble they might have been put to in performing the contract. In this case, if the plaintiffs wanted to get the difference in the value of the sheep, they should have waited until March 31st before commencing the action. Assuming however that he would be entitled to the difference between the value of the sheep at any time between the date of the acceptance of the breach and the time for the delivery and the contract price, then the plaintiffs must show that the jury were manifestly wrong, and it was their duty also to show that sheep of this kind would be worth in the market at Charters Towers a certain price. He argued that the plaintiffs had failed to do this.

Griffith, Q.C., in reply, quoted authorities to show that the true measure of damage was "the difference between the contract price on the several days on which the contract was to be performed," notwithstanding that the time for performing contract had not expired when the action was brought, and said that the onus was on the defendants to show that the plaintiffs might have brought the action in such a way, so as to mitigate the damages. There was no market to buy sheep in Charters Towers, but where there was no market price the actual value must be taken.

HARDING, A.C.J., in delivering judgment, said:— On the 5th October last year, the plaintiffs purchased from the defendants 4,500 sheep, more or less, a certain number of them were to have six teeth, and the others four teeth. The terms were that they should be delivered at Charters Towers on or before the 31st March, 1883. They were to be paid for at the rate of 8s. 6d. per sheep, half in cash, and the balance by promissory note at four months. On the 18th October, 1882, that contract was broken by the defendants, the plaintiffs accepted that breach and commenced their action in the present case in November, 1882, claiming damages for the breach of contract; the case was tried on the 10th and 11th May, before Mr. Justice Cooper, at Charters Towers, and a verdict was given for the plaintiffs with 20s. damages. [His Honor read the evidence in the case.] The plaintiff was dissatisfied with the verdict, and at the last sittings of this court obtained a rule *nisi* returnable at the present sittings to shew cause why the findings of the jury as to damages should not be set aside as inadequate. Now in order to ascertain that, we must first of all ascertain what should be the measure of damage in this case. The action is for a breach of contract by a vendor where the property has not passed, but it is further than that, it is a case of a breach of contract before the time of completion, an acceptance of the breach by the purchaser, and a suing thereupon before the time of completion. We have had a number of cases quoted before us, and I think that the rule of damage is the same as if the breach had happened at the end, with this difference that if it had been at the end, and there had been a market in which goods of the kind could have been readily bought, the damage could be measured by the excess, if any, of the market price at which such goods could have been bought over the amount of the contract price at the time of the breach. The damage must be estimated according to the different amounts at a future time, which would not have arrived in this case, but the trial did not take place until after the time fixed for the completion of the contract. If the trial had come on before that the time the damages would have had to be estimated as at the time of completion, that is the rule where there is a market, but where there is no market where the goods are readily obtainable, then the measure of damage is the amount of loss which may be expected in the ordinary course of things to flow from the non-fulfilment of the contract, and to be the natural consequence of it, assuming the plaintiff to have acted in a reasonable manner; and this may be measured by the cost to which the plaintiff is put in supplying himself *cy près* in the ordinary course of business. Now if that be the right rule, the evidence we should have expected to have been laid before the jury would have

been evidence of what sheep to supply this contract could have been bought for at the ordinary places where sheep are got for Charters Towers, according to Wilson's evidence they have to be brought 200 or 300 miles. The plaintiff had to be placed in the position he would have been if the contract had not been broken, he was entitled to supply himself with the goods of which he had been disappointed, *cy près*, in the ordinary course of business. This may be expressed in other words, using the language of Lord Justice Cotton, in *The Hydraulic Engineering Co. v. M'Haffie, 4 Q.B.D., 670*:—"It cannot be said that damages are granted because it is part of the contract that they shall be paid; it is the law which imposes or implies the term that upon breach of a contract damages must be paid. We must follow out the rule that the plaintiffs are only to have the damages which are the ordinary and natural consequence of the breach." Now here what ordinary and natural consequence could have been in the contemplation of the parties at the time the contract was entered into, certainly not that the plaintiff, if the contract was broken was to be allowed to buy sheep by twos and threes in the streets of Townsville, but that he was to buy the sheep in the ordinary course of business, as the witness said, 200 or 300 miles from Townsville. We have had no evidence as to the value of such sheep or what it would have cost him to get them, consequently on that ground I should be inclined to hold that the verdict of the jury was sustainable. Then it has been said that the verdicts of juries will not be lightly interfered with, and that in this case there is a conflict of evidence, and that the question of credibility arose. Perhaps the most difficult cases to decide are those where the credit of the witnesses has gone to the jury. Where there is a conflict of evidence this court has accepted the language of *Tindall*, C.J., in *Mellor v. Taylor, 3 Bing, N.C., 111*:—"We agree that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict, except that it is found, in the opinion of the court, against the weight of the evidence, the court ought to exercise, not merely a caution, but a strict and sure judgment, before they send the case to a second jury. The general rule under such circumstances is, that the verdict, once found, shall stand. The setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence." I think on the evidence of the plaintiff's own witnesses there is a conflict of testimony, and that being the case I think it was for the jury to believe them or not. In the case of *Mellin v. Taylor*, *Tindall*, C.J., goes on with his observations as follows—"It is an observation which would apply to every case of a motion to the court, as to some of the judges, if not as to all. But in this case the learned judge who presided at the trial had that opportunity; and he has reported to us that he is not satisfied with the verdict; a course which has in it no novelty whatever, but has been the constant practice from the earliest time at which new trials have been granted, and is acted upon every day." So that it appears up to that time and much later there was a practice before granting a new trial, to refer to the judge who tried the case. That practice was not followed in this case, nor in the case of *Macdonald v. Tully*, nor in recent cases in England. There is the case of *Solomon v. Belton, 8 Q.B.D., 176*, the marginal note of which states:—"The question whether a new trial should be granted on the ground that the verdict was against the weight of evidence, must depend upon whether the verdict was such as reasonable men ought to have given, and not upon whether the learned judge who tried the action was dissatisfied or not with the verdict." The judgment of the court was that of *Jessel*, M.R., *Brett* and *Cotton*, L.L.J. That appears to contain the sanction of very high authority at home to the course taken by this court previously, and to the course now taken in deciding this motion without making reference to the judge who tried the case. No doubt in some cases it might be desirable to do so, but it would be very inconvenient when the circumstances of the colony are considered if a

hard and fast rule was laid down. I quote these authorities to show that we are following the advanced construction the law at home has obtained. There was some point made upon the case of *Roper v. Johnson*, reported *L.R., 8 C.P., 167*; and it is said that that court laid upon the defendant the onus of showing by evidence that the plaintiff could have supplied himself in the ordinary course of business at a less value. But the law in an action of breach of contract gives a plaintiff nominal damages and nothing more, if he wants more he must by proper evidence, as defined by the judge, show the jury the damage he has suffered. That is the finding in *Roper v. Johnson*. Upon the whole I think the rule must be dismissed with costs.

Pring, J., I concur.

Solicitors for plaintiffs, *Daly & Hellicar*.

Solicitors for defendants, *Rees, Jones & Brown*, Brisbane and Rockhampton.

MENZIES *v.* DESHON.

Crown Lands Alienation Act of 1876, 40 Vict., No. 15, section 20.

The Secretary for Public Lands has not a discretionary power under the *Crown Lands Alienation Act of 1876*, to refuse to confirm the approval of a Commissioner duly pronounced in open Court, as provided by the said Act.

This was an action against Edward Deshon as nominal defendant appointed under the *Claims Against the Government Act*, for the specific performance of a statutory right which the plaintiff submitted he had against the Government of this colony. The plaintiff in his statement of claim alleged that he had lodged an application for certain land with the land agent for the Gladstone district, wherein the said land was situated under the *Crown Lands Alienation Act of 1876*, and that he had complied with all the provisions of the said Act, and that his application had been duly approved of by the Commissioner for Crown Lands for the said district, which approval was duly pronounced in open Court. He thereupon applied to the Secretary for Public Lands for the Colony of Queensland for his confirmation of the said Commissioner's approval of his application under section 20 of the *Crown Lands Alienation Act of 1876*, but the Secretary for Public Lands always refused to confirm the same, and he now claimed a declaration that under the circumstances he was entitled to have the approval of the Commissioner confirmed by the Secretary for Public Lands, and to have a lease of the said land issued to him, and for specific performance of the obligation of the Government to issue such lease.

The defence set up by the defendant, after denying that the Commissioner approved, was that the refusal of the Secretary for Public Lands to confirm the said Commissioner's approval was made *bonâ fide* for the public benefit and in the exercise of his discretion as such Secretary for Public Lands under the provisions of the said Act.

To this defence the plaintiff demurred, and the demurrer now came on for argument.

Griffith, Q.C., and *Byrne*, appeared for the plaintiff; *Chubb, Q.C., Attorney-General, Garrick, Q.C.*, and *Real* for the defendant.

Griffith, Q.C., referred to sections 11 and 12, of the *Crown Lands Alienation Act of 1876*, and submitted that the real question was whether the confirmation by the Minister referred to objections raised in the Commissioner's Court or not. He referred to the latter part of the 17th section which deals with the application, and to section 20 which is as follows:—

"When any land selected as aforesaid shall have been surveyed the Minister shall if all the conditions and provisions of this Act has been complied with, confirm the approval of the Commissioner, &c."

He submitted that the interpretation of the word "shall" in the said section was contained in section 20 of the *Acts Shortening Act*, and he contended that land was proclaimed open by an act of State and not by the Minister, and he submitted that the contract was complete as soon as the Commissioner had approved, and that the plaintiff had a statutory right to have such approval confirmed by the Minister. As to the nature of a statutory right, he cited *Blackwood*

v. *London and Chartered Bank of Australia, L.R., 5 P.C., 110.* He also referred to *The Queen v. The Commissioner of Woods and Forests, 17 L.J., Q.B., 341;* and to *Pearson and others the Commissioners of the Waste Lands Board of Southlands* v. *Spence, L.R., 5 App. Ca. 70,* to show that a right to specific performance may be enforced against a Crown officer. He submitted that in this case any objection might have been taken by the Commissioner, but no objection was taken, and consequently the contract was complete, and the Minister could not object to confirm.

Chubb, Q.C., Attorney-General, referred to sections 12 and 28 of the *Crown Lands Alienation Act of 1876,* and contended therefrom that the Minister might exercise a discretionary power, and he referred to "*Maxwell on the Interpretation of Statutes,*" *p. 337,* as to the performance of public duties.

Garrick, Q.C., followed, and submitted that until the Minister had confirmed there was no contract between the Government and the plaintiff, and that consequently this was not a proper form of action; that the plaintiff's first step should have been to get the confirmation of the Minister, and that under the present form of action the Court had no jurisdiction to compel the Minister to confirm. He contended that the cases referred to by counsel for the plaintiff were not applicable, that in those cases there was a contract. Finally, he submitted that:—(1) The action was not in the proper form. (2) If it was, that the plea was a good one.

Griffith, Q.C., in reply, cited *The Queen v. Powell, 1 Q.B., 352.*

Harding, A.C.J.:—This is an action between John Newbery Menzies, and Edward Deshon, being the nominal defendant appointed under *The Claims against the Government Act,* to defend an action which the plaintiff alleges he is entitled to bring against the Government. His claim is to a declaration that under the circumstances he has set forth he is entitled to have the approval of the Commissioner confirmed by the Minister for Lands, and to have a lease of the said land issued to him, specific performance of the obligation of the Government to issue that lease, an injunction to restrain the Government from disposing of the said lands otherwise than by lease to the plaintiff, and in the alternative, damages. He has made a case shewing that he has duly obtained the approval of the Commissioner to his application to select the land in respect of which he claims the declaration, and states that, since that approval, these lands have been surveyed, and that the survey has been approved of by the Surveyor-General. Since the approval of the survey he has frequently applied to the Secretary of Public Lands for the confirmation of the Commissioner's approval of his application, but that the Secretary for Public Lands has refused to confirm the same. That being the plaintiff's claim the defendant says that it is a bad claim, because the Secretary for Public Lands' refusal to confirm was made *bonâ fide* for the public benefit and in the exercise of his discretion under the Act. There is a joinder and a demurrer, and the plaintiff states two grounds for argument that the Secretary for Public Lands in the paragraph mentioned has not a general discretionary power or any power to refuse to confirm the Commissioner's approval made under the circumstances set forth in the statement of claim, but was bound to confirm the same, and that the plaintiff being entitled to have the said approval confirmed, the reason of the said Secretary for Public Lands for refusing to confirm the same are immaterial. The sections of the Act which have been particularly referred to are the 10th, 11th, 12th, 20th, and 28th. The mode of obtaining land under the Act appears to be that an application has to be lodged by the party desiring to acquire the land, and that that application has to come on for approval or rejection at the next land court. The power of the presiding party at that court is defined by the 11th section. The president is to be the Commissioner who holds an open court, "at which all applications shall be considered and approved or rejected, or otherwise dealt with, and at which all such other matters as are by this Act declared

to be within the cognizance of the Commissioner and required to be dealt with in open court, shall be dealt with." For the next step, if the application is approved, we must go to section 20 to see what is the consequence of approval. "When any land selected as aforesaid shall have been surveyed, the Minister shall, if all the conditions and provisions of this Act have been complied with, confirm the approval of the Commissioner, &c." That is, if all the conditions and provisions of the Act has been complied with. By section 11 the Commissioner had to consider something on the application, and if what he had to consider was not that the conditions and provisions of the Act had been complied with, he had to consider nothing. Consequently the Commissioner's approval is proof that all the conditions and provisions of the Act had been complied with up to the time he approved of the application at his court. Then what other conditions and provisions are there to be considered? The survey has to be approved of which is alleged by the statement of claim to have taken place, so that having got the approval provided for by section 20, unless some of the conditions and provisions of the Act have not been complied with, the Minister has to confirm. Now in this case the Secretary for Public Lands has refused to confirm, and he has stated that he refuses *bonâ fide*, and for the public benefit, and in the exercise of his discretion as such Secretary for Public Lands, which is stating the reason for his non-compliance, and not stating the non-compliance of a condition or provision, unless we can hold that he has a discretion to refuse to confirm if he does so *bonâ fide* for the public benefit. Now unless that discretion arises under section 12 he has not got it, and unless section 12 is read into the construction I am placing on the Act, reading sections 11, 20, and 28 as sections which define the complete mode of obtaining land from application to lease, and which are complete in themselves, unless it is necessary to read in section 12. If these sections give a consistent whole by themselves, and if section 12 cannot be read in without rendering that consistent whole inconsistent, I should say that section 12 cannot be read in to disturb that which is complete without it. Now, for a moment reading in section 12, the effect would be that the proviso to section 12 is added to section 11, because the moment you introduce section 12 and hold that section 12 forms a necessary step in the application and lease you must hold that the approval or rejection in section 11 is subject to the provisions of section 12. Amongst others that the decision approving the application is not to be final until confirmed by the Minister, that is to say, that the Minister is to have the power to disaffirming in the absence of the party to be injured or deprived of his benfit by the act of the Minister. Now such a proceeding as that behind a man's back is entirely unknown to the English law, unless it be provided for by statute, and where it is intended to be provided for by statute, I maintain that the statute must speak clearly and distinctly. The statute has spoken clearly and distinctly in sections 11, 20, and 28. Consequently, I hold in the simple case of an application where no question for decision is raised, that section 12 forms no part of the procedure, and I think that the proposed defence does not show a want of compliance with the provision of the Act under section 20. If the defence had shown a want of compliance of some condition or provision possibly my decision might have been otherwise, but it does not, there is nothing of the kind. It starts up and says "I was told to do so and so." As far as my decision goes I hold that he was not entitled, and consequently the allegation that he was entitled to do so is no defence to the action, that is all I intend to say in this case. I simply decide that the statement in the second paragraph of the defence is no answer to the action. When the case has been tried and the facts found, a motion for judgment will have to be moved for. With regard to the question whether the claiming part of the statement of claim, technically claims the exact relief to which he is entitled I do not at the present moment decide that it does, but I decide that he is entitled to something, but I am not

prepared on demurrer to say to what relief he is entitled.

Pring, J.:—I am of the same opinion and for precisely the same reasons. I think that section 20 is clear and not curtailed by section 12. I think his refusal to confirm upon the grounds stated is not a defence warranted under the Act.

Solicitor for plaintiff, *Bunton*.

Solicitor for defendant, *Crown Solicitor*.

LEA *v.* HOWARD SMITH & SONS.

Bill of Lading—Common Carriers—Demurrer.

The following condition in a bill of lading, viz.:—"The steamer not to be responsible for loss of or damage to any parcel or package exceeding the sum of two pounds (£2) sterling in value unless booked as of more than that value and paid for 'accordingly,' does not protect the carriers from liability occasioned (1) by their gross and wilful default; (2) by the negligence of their servants in transhipment; (3) or by the unseaworthiness of the barge into which the goods were transhipped."

Demurrer to part of a defence.

The statement of claim in substance alleged as follows:—

1. The defendants are shipowners and carriers of goods for hire between Sydney, Brisbane, and Rockhampton.

2. On the 10th day of August, 1882, certain goods were delivered to the defendants, and the defendants received the same upon the terms of two bills of lading signed by the defendants.

3. The said bills of lading were in form exactly similar to each other, and the defendants thereby undertook to carry the said goods from Sydney to Rockhampton, subject to certain terms and conditions which so far as they are material, were as follows:—

"The steamer not to be responsible for any loss of or damage to goods whether in steamships, barges, boats or any vessel, or at wharves, warehouses, agencies or elsewhere, by rats, mice or other vermin, or by the act of God, the Queen's enemies, fire, tempest, storm, flood, inundation, jettison, barratry, collision, breakage of machinery or the perils or dangers of the sea, rivers, or navigation of whatsoever nature or kind soever, nor for any delay, loss or damage occasioned through deviation, towing, or assisting vessels, nor for any loss or damage occasioned by any act, neglect or default of any pilot, or any masters or mariners, or other servants of the company in navigating the company's vessels, nor for any loss, damage, breakage whatsoever under any circumstances, unless such loss, damage or breakage shall occur or arise from or in consequence of the gross and wilful default of the steamer."

4. The "You Yangs" sailed from Sydney with the said goods on board, and arrived in the Fitzroy River on her voyage.

5. On the arrival of the "You Yangs" the said goods were transhipped into the barge "Scotia" (not being a ship or vessel of the defendants), to be in the said "Scotia" carried to Rockhampton, for which purpose the "Scotia" was towed by the "Ant" (not a ship or vessel of the defendants).

6. Stranding of the "Scotia" and consequent damage to the goods.

7. Damage not caused by any of the excepted perils and casualties.

8. The "Scotia" towed by the "Ant" was totally unfit for the carriage of goods in the said Fitzroy River, and the defendants were guilty of gross and wilful default in such transhipment as aforesaid, and the said loss and damage occurred through such, the gross and wilful default of the defendants and not otherwise.

9. Stranding and damage caused by the negligence of the defendants' agents.

10. The "Scotia" in tow of the "Ant" unseaworthy.

The statement of defence besides the conditions set out in the statement of claim set forth a further condition as follows:—

"The steamer not to be responsible for loss of or damage to any parcel or package exceeding the sum of two pounds sterling in value unless booked, as of more than that value and paid for accordingly."

And in paragraph 9 the statement of defence

alleged, that the said goods were contained in cases, trusses and rolls, and were accepted and received by them to be carried as aforesaid, subject to such terms and conditions whereof the plaintiff always had knowledge and notice, and that the goods contained in each of the said cases, trusses and rolls, were, when received by the defendants to be carried as aforesaid, of a much greater value than the sum of two pounds sterling which the plaintiff well knew, yet the same were not, nor was any of them booked as of more than the value of two pounds and paid for accordingly within the meaning of the said terms and conditions.

The plaintiff demurred to this paragraph on the grounds that such condition does not protect the defendants from liability occasioned; (1) by their gross and wilful default; (2) by the negligence of their servants in transhipment; (3) by the unseaworthiness of the "Scotia in tow of the "Ant."

Griffith, Q.C., and *Sheridan* for plaintiff in support of demurrer, cited *Garnet v. Willan, 5 B. & Ald. 53; Hinton v. Dibbin, 2 Q.B., 646: Phillips v. Clarke, 26 L.J., C.P., 168: Czeck v General Steam Navigation Company, L.R., 3 C.P., 15; Martin v. Great India and L.R., 3 Exch., 9: Scaife v. Farrent, L.R., 10 Exch., 58:* as to unseaworthiness, *Steel v. State Line Steamship Co., 3 App. Ca. 72; Tough and others v. A.S.N. Co., Courier*, July, 1870.

Garrick, Q.C., and *Murray-Prior*, for the defendants.

Garrick, Q.C., argued at some length, and cited *McCawley v. Furness Railway Company, 8 Q.B., 57; Peek v. North Stafford Railway Company, 32 L.J., Q.B., 241; Carr v. Lancashire Railway Company, 7 Exch. 707.*

Murray-Prior followed, and referred to *Walker v. New York Company, 2 El. & Bl., 750, 759: Wyld v. Pickford, 8 M. & W., 445; Harris v. Packwood, 3 Taunton, 264: Marsh v. Horne, 5 B. & C., 322.*

Griffith, Q.C., in reply.

Harding, A.C.J.:—This is a demurrer to a distinct ground of the defence raised to the plaintiff's statement of claim, which is shortly to the effect that the plaintiff shipped certain goods from Sydney to Rockhampton by the steamer "You Yangs" upon certain bills of lading, which contained terms restrictive of the liability of the defendants. During the voyage the "You Yangs" being in the Fitzroy River, transhipped the goods into a barge called the "Scotia," not being one of their own vessels, to be carried to Rockhampton. The plaintiff alleges that the "Scotia" was towed by a steamer called the "Ant," which did not belong to the defendants; that the "Scotia" was stranded in the Fitzroy River and became full of water, and the goods were greatly damaged and deteriorated in value, and were afterwards delivered in such damaged state, the damage not being caused by any of the perils excepted in the bills of lading. That the "Scotia" towed by the "Ant" was totally unfit for the carriage of goods in the said Fitzroy River, and that the defendants were guilty of gross and wilful default in transhipping the same into the "Scotia," and in causing the same to be carried in her, and that the loss and damage occurred through such gross and wilful default of the defendants and not otherwise. Then there is an alternative complaint by which the plaintiff says, that the stranding of the "Scotia" and consequent damage to the goods were occasioned by the negligence of those in charge of the "Scotia" who were the defendants' agents and servants for the purpose of the conveying of the said goods, also another alternative claim that the "Scotia" being in tow of the "Ant," was not seaworthy for navigating the said Fitzroy River when the said goods were placed on board of her, and that the said damage was occasioned by such unseaworthiness. By reason of these matters, the plaintiff's claim arises. To this the defendants have set out the conditions of the bills of lading, which it will be necessary to read later, and the paragraph objected to, that the goods were accepted and received by the defendants to

be carried as in the pleadings mentioned subject to and under the terms and condition in the bills of lading set out, whereof the plaintiff always had knowledge and notice, and that the goods were when received by the defendants to be carried as aforesaid of a much greater value than the sum of two pounds sterling which the plaintiff well knew, yet the goods were not booked as of more than the value of two pounds and paid for accordingly within the meaning of the said terms and conditions. These terms I now read: "The steamer not to be responsible for any loss or damage to any parcel or package exceeding the sum of two pounds sterling in value unless booked as of more value and paid for accordingly, nor for any loss of or damage to goods whether in steamships, boats, barges, or any vessel, or at wharves, warehouses, agencies or elsewhere, by rats, mice or other vermin, or by the act of God, the Queen's enemies, fire, tempest, storm, flood, inundation, jettison, barratry, collision, breakage of machinery, or the perils or dangers of the sea, rivers, or navigation of whatever nature or kind soever, nor for any delay, loss or damage occasioned through deviation, towing, or assisting vessels, nor for any loss or damage occasioned by any act, neglect, or default of any pilot, or any masters or mariners or other servants of the company in navigating the company's vessels, nor for any loss, damage, or breakage whatsoever under any circumstances, unless such loss, damage or breakage shall occur or arise from or in consequence of the gross and wilful default of the steamer." These are the terms, and in order that the defendants' defence as stated in the 9th paragraph should be sufficient, it will be necessary for us to decide that the whole of the terms of these bills of lading applying to these goods were contained in the first clause of those I have mentioned, namely:—"The steamer not to be responsible for loss or damage to any parcel or package exceeding the sum of two pounds sterling in value unless booked as of more than that value and paid for accordingly." We should also have to hold that that paragraph was sufficient to limit the liability of the shipowner in all cases. I do not think that that paragraph is necessarily to be read alone. I think that the last clause of those terms should be read with it, and that the words "unless such loss or damage or breakage shall occur or arise from or in consequence of the gross and wilful default of the steamer" necessarily forms part of the first clause, and consequently the defendants have not pleaded the whole of the clause of the bill of lading which would except them from the liability, and if they had, they have not included sufficient allegations to bring them within the exception.

The demurrer must be allowed.

Pring, J.:—I concur. I may state that I think the case of *Tough v. A. S. N. Co.*, in which the judgment of the Full Court was delivered is applicable to the circumstances of this case.

Solicitors for plaintiff, *Rees, Jones & Brown*, Brisbane and Rockhampton.

Solicitor for defendants, *Bruce*.

DRAKE *v.* THORNTON.

Chinese Immigrants Regulation Act of 1877, (41 Vic., No. 8), sec. 3.

The words "Chinese passengers" in the 3rd section of the *Chinese Immigrants Regulation Act of 1877* mean all the Chinese passengers in course of transit.

Garrick, Q.C., and *Rutledge* moved absolute a rule calling upon William Thornton, Water Police Magistrate, and Thomas Mulhall King, Collector of Customs, to shew cause why a writ of prohibition should not issue to restrain them from proceeding upon a certain conviction of the said Water Police Magistrate given on the 7th day of June, 1883, in the matter of a complaint by the said Collector of Customs against the plaintiff, for an alleged offence against the provisions of the *Chinese Immigrants Regulation Act of 1877*, whereby the plaintiff was adjudged to pay £48, and £5 5s. costs.

The information alleged that the "Venice," 1,271 tons register, arrived at Cooktown, a port of Queensland, having on board a greater number

of Chinese passengers than in the proportion of one to every 10 tons of the tonnage of such steamer.

The rule was applied for and obtained on the grounds:—

(1). That there was no evidence to support the conviction or order.

(2). That the evidence taken at the hearing of the said complaint did not disclose any offence within the meaning of the *Chinese Immigrants Regulation Act of 1877*.

Chubb, Q.C., *Attorney-General*, and *Power*, showed cause against the rule.

Chubb, Q.C., *Attorney-General*, submitted that the words of the section were perfectly clear, that "all passengers" in the 3rd section of the Act meant all Chinese on board, except the crew. He contended that by this Act the Legislature wanted to make it very difficult for Chinese to come here. On the construction to be put upon the section he cited, *In re Venner, L.R., 2 Ch. D., 522; Emanuel v. Constable, 3 Russ. 436; Baywater v. Bradling, 7 B. & C., 660: Maxwell on the Interpretation of Statutes, pp. 35-39.*

Garrick, Q.C., in reply, submitted that in order to arrive at the meaning of the 3rd section the rest of the Act and the preamble must be looked at. He contended that the intention of the Act was to restrict the landing of Chinese in the colony, and that the Act could not interfere with matters affecting the other colonies, which would be the case if the words "Chinese passengers" in the 3rd section were held to apply to Chinese passing to another colony in a ship which had merely called in at a Queensland port; and that, therefore, the words "Chinese passengers" in the section only applied to Chinese who were landed.

Harding, A.C.J.—After stating the facts said, the offence is charged to have arisen under the 3rd section of the *Chinese Immigrants Regulation Act of 1877*. By that section it is enacted that: "If any vessel shall arrive in any port of Queensland having on board a greater number of Chinese passengers than in the proportion of one to every ten tons of the tonnage of such vessel according to the registry thereof if British, and if not, then according to the measurement defined by the *Merchant Shipping Act of 1854*, the owner, charterer, or master of such vessel shall be liable, on conviction, to a penalty not exceeding £10 for each Chinese passenger so carried in excess." The offence was for carrying more passengers than one for every ten tons. I may say that when the rule was obtained before me, I was struck with the bold manner in which it was brought up by Mr. Garrick, and I felt that at all events, if he did not get the best of the argument, he certainly had a strong case for argument, and that it was a matter which should be brought up for decision. It was contended that that 3rd section on the face of it was not clear—was not intelligible without assistance from other sections, and that if it did bear the meaning that the persons there called Chinese passengers were other than Chinese entitled to be landed, it conflicted with other sections of the Act. On going through the Act to see the meaning of section 3, and that difficulty having been raised by the other sections, the preamble might be brought in to assist in the interpretation. Reading the 3rd section, we find "Chinese passengers" mentioned twice, in the first part as to the number, and further on as to the liability to a penalty on conviction for exceeding that number. Now reading that by itself, I should say there was no difficulty—I should say that the word "passenger" refers to every one on a passage, and was unlimited. The word "passenger" does not occur again in the Act. We have in the 2nd section the words, "Chinese on board," and, subsequently, "such Chinese." "Chinese on board" probably means all the Chinese on board. In the 4th section, "Chinese arriving from beyond the colony;" so again in the sub-section, "each Chinese." In the 6th and 7th, "any Chinese," using the largest term. So again in the 8th, "any Chinese," and also in the 11th. "Chinese crew." So that we have in this Act the Legislature using three terms, clearly showing that they were dealing with three classes.

It seems hard to construe the words "Chinese passengers" in the 3rd section as used otherwise than in their ordinary meaning, namely, all the passengers in course of transit. It was endeavored to be shown that assistance would be afforded by the preamble, which is as follows:—"Whereas it is expedient to regulate the immigration of Chinese into the colony of Queensland," &c. Now I quote the words of *Channel*, B., in *Hughes v. Chester and Holyhead Railway Co., 1 Dr. and Smale 532.* He is speaking of enacting words being quoted:—"If, then, the words of the enacting clauses, taken together, are words admitting, according to their natural import, but of one meaning, they must prevail, notwithstanding an argument to the contrary, otherwise derivable from the preamble. If, on the other hand, the words are not so clear and explicit as to admit of but one clear and distinct meaning, but reasonable effect may be given to the words used in the enacting clauses by applying to them another meaning, then I apprehend that the preamble may be looked at to throw light upon the subject." Now here the 3rd section without the preamble is, I hold, clear; but even if it were necessary to go to the preamble for assistance, I do not think it affords any beyond giving the section its natural meaning. What is the meaning of "regulating immigration"? It was conceded that, in its strictest meaning, it meant the arranging or adjusting by method, and that an immigrant would be a person moving into the country. Various other meanings were endeavored to be placed on the word "immigrant," but does it mean anything more than "arrive"? Is there anything inconsistent with the rest of the Act? If that is so, the preamble goes no further, and if you cannot carry it further than that, or define what length of time they must stay on arrival, you gain nothing. If it means arrival in a port, it is perfectly consistent with the 3rd section, and I think the word "passenger" there means passengers in the course of their transit. It was attempted to bring the marginal note in here on the authority of *Jessel*, late Master of the Rolls, but the Court of Appeal has overruled him. It is not necessary to decide in this case whether the preamble should be read or not, but before it can be read to assist us in the interpretation of the section, it should be shown that at least it formed part of the legislative intention; and until that has been done, I cannot derive any assistance from it. I do not think it will be necessary to go into the matter at greater length. I think if these three sections—the 3rd, 4th, and 8th—be analysed, it will be found that they provide for every case likely to occur. I think that the conviction must be affirmed, and that the rule must be refused.

Pring, J.—I am of the same opinion. During the argument, I had a very strong opinion in favor of the construction sought to be put on the 3rd section of the Chinese Immigration Act by Mr. Garrick and Mr. Real. However, after endeavoring as far as my legal ability goes to give the true construction of the intention of the Legislature, I have come to the conclusion I have stated. Perhaps during yesterday and the day before I was partly misled in fancying the view which I had was the correct one, from thinking the Act might have been very stringent and hard, and therefore considering that the Legislature would not have passed such an Act. However, hard and stringent the terms of an Act of Parliament may be, if the intention of the Legislature can be gathered from the language, then a judge is bound to interpret it accordingly. The question arises in this case whether the language used in the 3rd section is plain enough without having to go to the preamble to assist the court in coming to a conclusion. I think it is. (His Honor here read the section.) Well, if I seek to put any other meaning upon the words "Chinese passenger" than that they refer to all Chinese on board except the crew, I should be obliged to insert the words "intending to land." No such words are used, and it appears to me that the Legislature had a perfect right to pass a clause of this description. They could not legislate for passenger vessels passing down the coast, but

they had a right to legislate for any vessels coming into our ports having on board more than a certain number of passengers. However harsh the provision, I agree with the learned Acting Chief Justice. I do not think that we need the preamble to assist us in interpreting the meaning of section 3, and the conviction must be affirmed.

Solicitor for applicant, *Macpherson.*

Solicitor for defendants, *Crown Solicitor.*

ANNEAR AND ANOTHER *v.* THE COMMISSIONER FOR RAILWAYS

Contracts are to be construed legally, and not strained one way or another.

In this case, the certificate of the Chief Engineer was made by the contract a condition precedent to any right or cause of action on the part of the contractor for payments of money under the contract.

Held, that such certificate was a condition precedent, and that the conduct of the chief engineer or the Government was not such as would make it inequitable that such condition precedent should be relied upon.

This was a demurrer to plaintiffs' statement of claim in an action upon two railway contracts, wherein the plaintiffs claimed damages for the loss sustained by them, by reason of the action of the Chief and Superintendent Engineers, in the carrying out of the contracts.

The *Attorney-General; Garrick, Q.C.*, and *Real* appeared in support of the demurrer.

Griffith, Q.C., *Power*, and *Sheridan*, for plaintiffs, in support of the statement of claim.

The facts sufficiently appear from the judgment.

Harding, A.C.J.:—This case has been argued before us at great length and great skill, and the time it has taken has been sufficiently long to enable one to weigh the arguments as they went along, and to verify the quotations made from the cases cited, and to read critically the pleadings upon which the question for decision arose. The action is one brought by Annear and Thorn against the Commissioner for Railways of this colony, claiming £27,000 damages, or in the alternative, an account. The damages or relief is sought in respect of two railway contracts entered into between the plaintiffs and the defendant for the construction of two sections of the Maryborough and Gympie Railway. The first indenture recites that, in pursuance of notice, the plaintiffs had sent in a tender for the construction of a railway from Maryborough to Tiaro according to the plans, sections, drawings, specifications, and general conditions annexed to the indenture; that the plaintiffs' tender had been accepted upon certain terms and conditions embodied in the indenture, at prices set forth in a schedule, and amounting in all to £96,739 1s. 1d. By the contract it was witnessed, that in consideration of this payment the plaintiffs covenanted that they would execute the work specified strictly according to the terms and conditions therein respectively contained, or reasonably to be deduced therefrom, and the defendant covenanted to pay the plaintiffs £96,739 1s. 1d., or such other sum or sums as the plaintiffs might be entitled to by virtue of that indenture at the time and in the proportions as the same might become due according to these documents. In this part of the indenture, and as I take it, the key to the construction of the whole, there is comprised the following clause:—

But it was expressly agreed that the true intent and meaning of these presents, and of the parties thereto, was that the obtaining by the contractors of the engineer's certificate entitling them to payment of any amount claimed, whether by way of damage or otherwise, should be a condition precedent to the payment thereof being made or enforced.

That is given to the indenture as a key for the interpretation of all the rest, namely, that the obtaining of the engineer's certificate of any amount claimed, whether by way of damages or otherwise, was to be a condition precedent to the payment thereof. In other words, that the indenture, conditions, and all the documents, were to be so construed that, as a preliminary to an action being brought thereon, the certificate of the engineer for the amount sued for must be first obtained. The principal conditions are set out in particulars the 6th, 12th, 18th, 39th. I propose reading them at length; others are set out: the 2nd, for instance, relates to the plans, sections, and drawings, and states that they represent generally the form and dimensions of the several

works, and ends by saying that, "in all cases of defective or ambiguous description, the interpretation given by the chief engineer shall be final and binding upon the contractor." So again in the 3rd condition, which contains provisions for the contractors providing all necessary implements:—

All of which shall, in any question that may arise either with the contractors themselves or with other parties, be held to be the property of the Government until the whole of the works shall have been completed to the satisfaction of the chief engineer, and no material that may from time to time be brought to the site of the works or within the line of fences, shall be removed therefrom without the sanction of the chief engineer.

Again in the 5th, the works shall be executed in a neat, substantial, and workmanship manner, &c., to the entire satisfaction of the chief engineer. The 6th I propose to recite at length, as also the 12th. Then the 14th. The contractor has to set out the works, but if the district engineer gives levels, &c., it is at the entire responsibility of the contractor; and no error or alleged error made by the district engineer in setting out the works shall be admitted as a plea for improper performance of work, nor used by the contractor for any claim against the Government. Then again, the 18th. As to the monthly payments, they are to be upon the certificate of the chief engineer at certain rates, the balance at the completion of the contract, and it is expressly declared that the obtaining a certificate from the chief engineer that the work has been completed to his satisfaction, shall be a condition precedent to the contractor having any right or cause of action. Under the 20th, the contractor has to furnish the district engineer at the end of each month with a detailed statement of all work upon which he claims payment. The 31st: If, from any delay, default, or any other cause on the part of the commissioner or his officers, &c., the contractor shall be delayed, he shall be allowed such extension of time in completing his contract as the chief engineer shall consider reasonable, but the contractor is to have no claim for damage in respect of such delay or default:—

6. The works will be carried on under the immediate charge of a district engineer or superintending officer acting under the chief engineer, whose directions in all points relative to the mode of executing the works or to the nature and quality of the materials used, or to the workmanship, are to be received and acted upon by the contractor; and such officer shall have power to reject and condemn any workmanship or material that he may deem unsuitable for the purpose intended or at variance with the terms of the specifications, and any materials or workmanship so condemned and rejected shall be promptly removed and replaced by the contractor, at his own cost, with other material or workmanship to the entire satisfaction of the superintending officer. But in case that the contractor should consider that the district engineer or superintending officer unnecessarily or unjustly condemns and rejects any materials or workmanship, or should any dispute relating to the works arise between the contractor and the district engineer or superintending officer, such dispute shall be by them referred to the chief engineer, whose decision shall be final and binding on both parties.

12. If at any time during the progress of the works the chief engineer shall deem it necessary or expedient to increase or diminish, add to or dispense with, any part or parts of the works embraced under this contract, or to alter their situation or vary their dimensions or form, he shall have full power to do so, and the contractor shall be bound to execute all such alterations as ordered and directed by the chief engineer, and no such alteration, increase, or diminution of works shall in any way annul or set aside this contract, or extend the time for the completion thereof. Nor shall compensation for damage, injury, loss or profit, or otherwise, be allowed to the contractor for or on account of any works altered, increased, or diminished, to whatever extent the chief engineer may exercise the powers above described, but such additions or alterations shall be measured and allowed and paid for, or such deductions credited to the Commissioner for Railways, as the case may require, according to the schedule of prices attached to the tender. And if any portion of the work so ordered to be done shall not be of the class of works provided for in the schedule of prices, the same shall be executed by the contractor at such price as may be agreed for with the engineer; or if the contractor and the engineer cannot agree as to the price to be paid for any work required to be done of a different class from that provided for in the schedule of prices, the engineer may order and direct the same to be done by such other person or persons as he may think fit. And it is hereby expressly declared that no departure from the works as shown by the drawings, or as specified, shall be allowed or paid for unless the same has been executed under a written order signed by the engineer or his superintending officer.

39. Should any dispute arise as to the proper interpretation of the specifications, or as to what shall be considered carrying on the work in a proper and workmanlike manner, or as to the quality of the work or materials used, or as to the expense of any additional work or a deduction from that specified, or as to any alteration which may be more or less expensive than the work specified, or as to any payments or claims in respect of

the work, or as to any other claim, matter, or thing connected with or in any way arising out of the contract, directly or indirectly, whether professional or otherwise, the same shall be referred to the chief engineer, whose decision shall be final and binding on all parties, anything in law or equity to the contrary notwithstanding. And no action or suit shall be brought by the contractor against the commissioner until the matters in dispute between them shall have been so referred to and decided by the chief engineer, and then only for such sum as he shall award in respect thereof. And the commissioner shall not in any case be liable to pay any sum, by way of damages or otherwise howsoever, to the contractor in respect of any matter in dispute until the amount thereof shall have been assessed and awarded by the chief engineer.

Then the case goes on to state that by another indenture between the same parties, dated 20th May, 1879, whereby the plaintiffs contracted to construct a railway from Tiaro to Gympie, being a continuation of the same railway, according to certain plans and specifications and general conditions, for the sum of £110,334 1s. 11d., the conditions and documents of the second indenture were to the same effect as in the first, with a further condition, No. 35, which I do not find it necessary to read in full. That is the plaintiffs' statement of the case under which they claim. The defendant on that case says that without the certificate of the engineer no claim could arise under the contract. The plaintiffs, in order to get themselves out of that construction of the contract, go on to say that the special circumstances of this case relieved them of the necessity of getting the engineer's certificate before they could sue. They state the completion of the work in accordance with the terms of the indentures respectively, and say that James Thornloe Smith was the superintending engineer of the works at the times mentioned, and that Smith, during the progress of the works, gave divers directions to the plaintiffs with respect thereto, and condemned and rejected materials, and they considered and still consider such directions were oppressive and unnecessary. Disputes and differences which had not been adjusted arose between the plaintiffs and Smith as to materials and as to matters set forth in paragraph 11 of the claim, and it is alleged that the plaintiffs had thereby been put to great loss and expense, and more particularly in respect of the following matter:

In respect of the works under the first contract—(1) by reason of erroneous measurements by the officer to the plaintiffs of ballast supplied by the plaintiffs; (2) of directions given by him with respect to the sinking of cylinders of a bridge over the Mary River; (3) in respect of the cost of erecting a temporary bridge over the Mary, and a wharf on the river, both of which, it is alleged, were rendered necessary by Mr. Smith's directions; (4) of a staging unnecessarily erected at Graham's Creek bridge by the engineer's directions; (5) by reason of erroneous plans and instructions furnished by Mr. Smith; (6) by reason of extra expense caused by delay in the completion of the works through the directions of the superintending engineer; (7) of increased expenditure caused by obeying the directions of that officer with respect to materials rejected by him, but which were in accordance with the contract.

And in respect of the works under the second contract —(8) by reason of increased expenditure caused to the plaintiffs in wages and the loss of the use of horses and plant in consequence of the delay in the completion of the works under the first contract; (9) in respect of the increased cost of carriage of materials in consequence of such delay; (10) of fencing, ballast, and culverts unjustly condemned by Mr. Smith; (11) of expenses incurred by obeying the directions of that officer to enable him to examine certain ballast after the work had been completed; (12) by reason of the directions of the superintending engineer with respect to the alteration of certain cattle pits on the works; (13) by reason of the loss incurred by the plaintiffs from their workmen having to remain idle for seven days in consequence of a direction given by Mr. Smith, and afterwards countermanded; (14) and of the removal from the plaintiffs by his direction of a ballast engine.

The plaintiffs also say they suffered loss in respect of the locomotive which was supplied to them by the defendant, which was wholly inefficient and unsuitable for work, and that they made frequent complaints to Smith, the superintending engineer, but he refused to entertain them. They state further that at the times mentioned Henry Charles Stanley was the Chief Engineer. The plaintiffs preferred claims in respect of the matters complained of, and submitted that they were entitled to have them decided by an independent Chief Engineer. By the 15th paragraph of the statement of claim they state that after the happening of the grievances complained of, before the settlement of the disputes, or the determination of their claim, the Government appointed James Thornloe

Smith, Chief Engineer, under the contracts in the place of Henry Charles Stanley. The plaintiffs further say that with respect to divers of the matters complained of, and in particular with respect to those mentioned in sub-paragraphs 2, 3, 4, 5, 6, 8, and 9 of the 11th paragraph of the statement of claim, the directions and instructions given, and the plans furnished by Smith, were given and furnished by him by the authority and direction of Stanley, as Chief Engineer, and that such directions were unreasonable, and such plans were wholly erroneous and unsuitable, and such directions and plans were given by and through the gross negligence and default of the said Stanley as Chief Engineer and not otherwise. Then they state that the defendant sometimes allege that Stanley was always the Chief Engineer and the proper person to decide the question. The plaintiffs submit that Stanley and Smith are both disqualified to act as Chief Engineer and that they are entitled to have their rights entertained and enforced by this court. This is the case made by the plaintiffs, and to that case the defendant, the Government, have demurred on three grounds, numbered respectively, 25, 26, and 27. The one numbered 27 is a demurrer to the whole of the statement of claim, the others are demurrers to parts only. I propose to dispose of the demurrer to the whole statement of claim first. The ground is that "the facts stated do not deprive the defendant of the right to have all questions in dispute in respect of matters in the said claim settled, and determined by the Chief Engineer for the time being, under the several contracts and do not entitle the plaintiffs to sue the defendant in respect of all or any of the said matters without having obtained the Chief Engineer's certificate as to the amount to be paid to the plaintiffs in respect thereof." That, shortly stated, is, that the defendant says that on the plaintiffs' statement of claim no right to sue him is shewn, as they have not pleaded that they are possessed of the Chief Engineer's certificate certifying that the amount sued for is due to them. A great number of cases have been cited by both sides and it has been broadly laid down by the defendant that he is not liable to be sued unless a case of fraud or collusion is made by the statement of claim, and that such a case is not made by this statement of claim. On the other side it is said—true the cases go to that extent clearly, but, as urged by Mr. Griffith in argument, no case had decided that it was not a good claim. From the cases quoted on the part of the plaintiffs some utterances may be found which do not exclude the possibility of such an action being brought except under circumstances of fraud and collusion, and little paragraphs were picked out in the cases cited by the defendant, and other cases were cited by the plaintiffs to show that, notwithstanding, where fraud and collusion existed it was clear, yet, there might be other cases in which that element did not exist. None of those cases shewed that such an event had ever happened. The principal cases cited, and which I propose to go through, are *Roberts v. The Bury Commissioners, L.R., 4 C.P., 755*, and on appeal, *L.R., 5 C.P. 310; Ranger v. The Great Western Railway Co., 5 H.L.C., 72; Sharpe v. San Paulo Railway Co., L.R., 8 Ch. App., 597; Wadsworth v. Smith, L.R. 6 Q.B., 333;* and the case of *Hill v. South Staffordshire Railway Co., 11 Jur. N.S., 192.* I take the case in the House of Lords first, the marginal note will be sufficient for the statement of the facts.

A corporation of itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed through the agency of individuals who act fraudulently, the Corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood had his agent so misconducted himself.

A contract between a railway company and a building contractor stipulated that payments should from time to time, during the progress of the works, be made by the company to the contractor, such payments to be made on certificates granted by the "Principal Engineer of the Company or his Assistant Resident Engineer." In case of dispute between the contractor and the Assistant Resident Engineer, the decision of "the Principal Engineer of the Company" was to be final; but at the completion of the works, if the contractor and the Principal Engineer differed, the differences between them were to be settled by arbitration. After differences had so arisen between the contractor and the company, it was discovered by the former that the Principal Engineer was a shareholder in the company. On a bill to have accounts

taken, one of the grounds for which was this fact, then first discovered :—

Held, that (no fraudulent concealment being alleged) it formed no ground for relief ; for that, by contract, the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested for the company. The case of *Dimes* v. *The Grand Junction Canal Company* (3 H. L. Cas. 759) held not to apply.

It will be seen from these facts that the engineer, being a shareholder, was interested in the matter to be decided by him, in short, being in the position of an arbitrator he was not in a position to act as judge in his own case. That case was cited more especially to show that interest in the engineer was not sufficient to debar him, as set up by Mr. Griffith. I propose on the general question to read from the Lord Chancellor's judgment at page 89, to gather the position which the law gives to engineers, architects, and persons appointed by the parties to decide readily and with dispatch as contracts go along, as contra-distinguished to arbitrators deciding in due form on disputes arising between parties, and referred to them. The Lord Chancellor says,—

"When it is stipulated that certain questions shall be decided by the engineer appointed by the Company, this is, in fact, a stipulation that they shall be decided by the Company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The Company reserved the decision to itself, acting however, as from the nature of things it must act, by an agent, and that agent was, for this purpose the engineer. His decisions were, in fact, those of the Company. The contract did not hold out, or pretend to hold out, to the appellant, that he was to look to the engineer in any other character than as the impersonation of the Company; in fact, the contract treats his acts and the acts of the Company, for many purposes, as equivalent, or rather identical. I am therefore of opinion that the principle on which the doctrine as to a judge rests, wholly fails in its application to this case. The Company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The respondents stipulated that their engineer for the time being, whoever he might be, should be the person to decide disputes pending the progress of the works, and the appellant, by assenting to that stipulation, put it out of his power to object on the ground of what has been called the unindifferency of the person by whose decision he agreed to be bound. It is to be observed that the person to decide was not a particular individual in whom, notwithstanding his relation to the respondents, the contractor might have so much confidence as to agree to be bound by his award, but any one whom, from time to time, the respondents might choose to select as chief engineer."

Now it will be seen these remarks might actually have been made in the present case. The Chief Engineer is not a definite person. He is the person who, from time to time, shall hold the position of Chief Engineer in this colony, and whose appointment is subject to Act of Parliament, and the plaintiffs, in contracting with the defendant and entering into an agreement of that kind, I think, must have been aware that anyone was liable to be placed in the position of Chief Engineer, and that in all probability the person who would succeed the then engineer in the case of his retirement or removal would be some other engineer permanently in the employ of the Government, such as the District Engineer, superintending the progress of large works, and that they must have been aware that in all probability, if anything happened to Stanley, he would be succeeded by Smith, and that they contracted knowing that and being willing to accept such person as should be the Chief Engineer for the time being. The next case is the one in the Jurist—*Hill v. South Staffordshire Railway Co.*, and there the marginal note states—

Where the accounts between the parties are so complicated that a court of law could not deal with them, this court has jurisdiction to entertain a suit for taking the accounts, and for payment of the amount found due. Where a company has stood by, and seen works performed, it will be held to have assented to them, as much as if it had been an individual. Where payments to a contractor were to be certified for by the engineer of a railway company, he is not disqualified from so doing on account of his having become lessee of the railway, at a rent of depending on the amount so certified for.

It is scarcely possible to conceive a case in which a man would have a greater interest than under the circumstances of this case, yet, it was held that that would not disqualify him. I propose, with the object I have stated, citing from the judgment of Lord Justice Turner, at page 193 :—

"There is also an outlying point of the case, which was raised on the part of the plaintiff, that the company's engineer was disqualified from exercising the powers vested in him by the contract, in consequence of his having become lessee of the railway upon the terms above-mentioned. It is not, I think, necessary for us to give any opinion upon this point, but it will be as well to say, that, looking to what was said in the case of *Ranger v. The Great Western Railway Co. (5 H.L.C. 72)*, I think it

would be difficult to maintain this point. The broad principle laid down in that case is, that the existence of an interest in the engineer did not create a disqualification in cases of this nature, and it would not, I think, be wise to fritter away this principle by attempting to draw distinctions between the nature and character of the interest which the engineer may have in different cases."

The next case is that of *Roberts v. The Bury Commissioners*, in the Common Pleas, and there the judgment is that of Kelly, Chief Baron, at page 326:—

"We agree that if the parties have so contracted, the court cannot inquire whether this is a prudent engagement on the part of the contractor: but we think that, where the effect of giving such a construction to the contract would apparently be to put one party completely at the mercy of the other, we ought not to give that construction to the contract, unless the intention is pretty clearly expressed. It is not to be inferred that the one party meant to bind himself so very stringently, unless it is so stated; and the Commissioners ought to take care to select words which the contractor could not misapprehend, if such was their object.....It is true that, if both parties had confidence in the architect, they might trust him with the power to bind both parties: but we cannot find any intention expressed to bind the contractor to abide by his decision. It seems to us that the meaning of the condition is, that the architect shall have authority to bind the Commissioners by granting an extension of time; and that, if he does so bind them, and the contractor accepts it, it shall be taken as full compensation for any damage sustained. If more was intended,—which, however, we cannot think,—it seems to us clear that it has not been expressed.....the two rejoinders to this replication would be good, if the parties had agreed that the architect should be the sole judge whether there had been a breach of contract on the part of the Commissioners occasioning delay; but, if we are right in the construction of the contract there is nothing to this effect in it, and consequently these two rejoinders are bad."

Holding that it was competent for the parties to agree that the architect should be sole judge, thereby answering the objection of Mr. Griffith that they could not so bind themselves so that this court could not interfere. Then *Wadsworth v. Smith*, Cockburn, C.J., at page 336 says:—

I am of opinion that in s. 17, by "an agreement or submission to arbitration by consent," is meant an agreement by which it is intended by the parties that the matter shall be submitted to a judicial enquiry before a person chosen between them, instead of being left to the ordinary proceedings of a court of law, and not merely left to the uncontrolled and off-hand decision of some architect or surveyor, to be appointed by one of the parties only.

In *Sharpe v. San Paulo Railway Co.*, it was held, in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties. And *per* Lord Romilly, M.R.:—Mere allegations of fraud without facts from which fraud will be inferred are not sufficient to avoid a demurrer. In the same case Lord Justice James says:—

In this case the contractors undertook to make the railway, not to do certain works; but they undertook to complete the whole line, with everything that was requisite for the purpose of completion, from the beginning to the end; and they undertook to do it for a lump sum, something short of two millions sterling, which was the amount upon which the Brazilian Government had undertaken to guarantee the interest. It is important to bear in mind that the company was formed upon the basis of this guarantee, and it would be a singular hardship upon the shareholders—almost a fraud upon them—if they found, when they had taken shares in a company based on this guarantee, that they were to be compelled to pay something entirely different, and to do so in consequence of some conversations between the contractors and the engineer. The first contract was, that the line should be completed for a fixed sum. But the plaintiffs say they are, upon several heads entitled to a great deal more than that sum. The first head is—That the earthworks were insufficiently calculated, that the engineer had made out that the earthworks were two million and odd cubic yards, whereas they turned out to be four million and odd cubic yards. But that is precisely the thing which they took the chance of. They were to judge for themselves.

These observations would cover a very large proportion of the charges for damage laid in the 11th paragraph. *Mellish*, Lord Justice, said:—

Nevertheless, a contract may be so framed as, under ordinary circumstances, to take away the jurisdiction of courts of law and courts of equity to determine what is the amount payable under the contract. Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an engineer, or what is found to be due by an arbitrator, and there is no agreement to pay otherwise—that is to say, in every case where the certificate of the engineer or arbitrator is made a condition precedent to the right to recover, there the court has no right to dispense with that which the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the engineer or the company which may make it inequitable that the condition precedent should be relied upon. If nothing of that sort has happened, then the parties are bound by that which they have made a condition precedent.

There we find in this case the proviso upon which the plaintiffs now sue. Now, take this case. The gist of the matter against Smith is that he had al-

ready decided, and was interested in maintaining his own decision, therefore he is not competent to decide. There is no statement of anything amounting to fraud on Smith's part or collusion between him and the Government. The heaviest statement against him is that his directions were unreasonable and oppressive. Then supposing that that went as far as they allege, there is nothing to connect it with the defendant. His Honor then referred to the cases of *Stevenson v. Watson, 4 C.P.D., 148*, and *De Worm v. Mellier, L.R. 16 Eq. 554*. That case was decided by *Malins*, V.C., and he criticised all the cases which were relied upon by the plaintiffs very strongly. I will here remark, as I have remarked before, that all the cases relied upon in support of the statement of claim are cases of courts of first instance, whereas the first four cases I have mentioned are cases in the House of Lords and Court of Appeal in England. Then there is the case of *Clarke v. Watson*, which deserves notice in *18 C.B.N.S. 278; 34 L.J., C.P. 148*, the marginal note is as follows:—

A declaration, after setting out an agreement by which the plaintiffs contracted with the defendants to do certain works for a certain sum, to be paid them by the defendants on production by the plaintiffs of the certificate of the surveyor of the defendants, that the works had been efficiently performed to his satisfaction, averred that, although all things had been done by the plaintiffs to entitle them to such certificate, yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, and the defendants had not paid the money payable on such certificate:—*Held*, on demurrer, bad, as not disclosing any cause of action against the defendants.

Erle, Chief Justice, said:—

This is a contract by the defendants to pay, on the production of the certificate of the surveyor of the defendants that the contractors had efficiently performed a certain portion of the work. Many contracts are so made, and every one is master of the contract which he chooses to make; and it is of the last importance that contracts should be construed according to the meaning of the words in which they are made. Now, here the contract by the defendants to pay, is on the production of such certificate of the defendants' surveyor, and in the present case no such certificate was produced; but the plaintiffs allege that the surveyor wrongfully and improperly neglected and refused to give his certificate. That is not sufficient. If it had been alleged that the defendants and their surveyor colluded to withhold the giving of the certificate in order to prevent the plaintiffs from being paid for their work, there is abundant authority, both at law and in equity, to shew that the defendants could not shelter themselves by means of any such misconduct. This is an attempt to take away from the defendants the protection afforded by the opinion of their surveyor, and to substitute a proxy in his place.

Now what the Chief Justice there said was not sufficient, was the allegation that the surveyor did wrongfully and improperly neglect and refuse to give his certificate, and that unless collusion was stated it would not be sufficient. Now there is no statement of collusion here. A corresponding statement would be that the Government had appointed Smith, knowing that he would wrongfully and improperly hold back his certificates, and that since his appointment held them back in collusion with the defendant. There is nothing of the kind here, and, so far, it falls short of the cases which have been cited. The case of *Kemp v. Rose, 1 Giffard 258*, was cited in a case I have already mentioned. In that case there was a promise which ought to have been made known to the contractor amounting to fraud. In *Ellis v. Hopper* it was said that the engineer was not precluded from acting by reason of pecuniary interest. Then there are the cases cited by Mr. Griffith, notably the case of the *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co., 9 Q.B.D. 118*, as to the kind of construction this contract must receive, namely, that where the contract is capable of receiving two constructions, it must not be constructed so as to conflict with the maxim "that no man can take advantage of his own wrong." That argument arises in this way: that Smith had done a wrong during the making of the railway; that by appointing Smith chief engineer the Government adopted or ratified the wrong he had done; and if these contracts were so construed as to require the certificate to be given by Smith before the action could be brought, the defendant would be taking advantage of his own wrong; and that if it were possible to construe this contract in any other way, it must be so construed. I said during the argument, and still say, and maintain, that all contracts are to be construed legally, and not to be strained one way or the other, but to have their legal construction placed

upon them. Then there is the case of *M'Intosh v. Great Western Railway Co., 2 M. & G. 74.* At page 86 there is a sufficient statement of the case as far as I find it necessary to mention it. The allegation, it will be seen, was that the engineer, acting in collusion with the directors, was to hold back his certificate of payment. At page 96 we find that the Lord Chancellor says:—

> It appears to me, therefore, that this is clearly a case in which the plaintiff cannot obtain what he is entitled to at law; and that his inability to do so, has arisen from the acts of the defendants, or their agent; and whether such acts arose originally from any fraudulent motive or not, I think that to use them for the purpose of defeating the plaintiff's remedy would constitute a fraud which this court will not permit the defendants to avail themselves of; and that they are, therefore, precluded, according to the statements in the brief, from raising the objection they rely upon to the plaintiff's equity: and that there is sufficient allegation of that which the fraud consists.

Then there is the case of *Scott v. The Corporation of Liverpool, 1 Giffard, 215;* there the bill was dismissed because no case of fraud, misconduct, incapacity, or refusal to act, was established against the engineer. Mr. Justice Erle, in delivering his opinion, states—

> By the contract, it appears to me that the engineer is interposed between the corporation and the contractors, and made the absolute judge of the performance of the works, and that there is no right in the contractors to demand payment, and no liability on the corporation to pay throughout the contract, unless the condition of obtaining a valuation by the engineer, and his certificate, has been fulfilled.

and Vice-Chancellor Stuart, in his judgment, states—

> It appearing that the engineer has never refused to discharge his duties according to the contract, and that he has done nothing to disqualify himself, but is still ready and willing to proceed to decide all matters between the plaintiffs and the corporation accordihg to the contract, there remains no ground whatever for the equitable interference of the Court.

Now the case the plaintiffs set up of disqualification is, as to Smith, that he was District Engineer when the matters of dispute arose and that during that time he gave directions which were unreasonable and oppressive, and that he rejected materials and workmanship; as to Stanley, that he was guilty of gross negligence in giving directions in the matters set out and out of which the dispute arose, and that he is not an impartial judge. That there was an implied condition in the contract that whenever a dispute arose there should always be a Chief Engineer not disqualified, to decide the dispute. If that argument is correct there has always been a Chief Engineer, and there has always been a Chief Engineer, in my opinion, who has not been disqualified from deciding the matter in dispute. I cannot find after reading this case that the conduct alleged therein on the part of the Chief Engineers was such as to make it inequitable that the condition precedent should be relied upon. Again, it has been argued if a claim arises it is for the Chief Engineer to decide it. The plaintiffs say, we have shown that we have a claim and we are entitled to have it decided by an independent engineer. I do not find any sufficient want of independence on the part on the engineers as alleged in the statement of claim. On the whole I do not think that the plaintiffs have shown in this statement of claim that Henry Charles Stanley and James Thornloe Smith are both or either of them disqualified from acting as Chief Engineer under the said several contracts for the purpose of determining the said disputes or claims, or any of them; nor that the plaintiffs are entitled to have their rights in respect of the premises ascertained and enforced in this court. I think the right way to dispose of this ground of the demurrer, No. 27, is to allow it, and as far as my judgment goes it is allowed.

PRING, J.:—I am of the same opinion, and for the same reasons stated by The Acting Chief Justice, and I have nothing further to add.

Solicitor for plaintiffs, *Thynne.*

Solicitor for defendant, *Crown Solicitor.*

THE ATTORNEY-GENERAL *v.* THE SHIRE COUNCIL OF TOOWONG.

Public Highway—Right of Way—Local Government Act of 1878 (42 Vic., No. 8).

The words "alter in width" in sect. 237 of the *Local Government Act of 1878* does not give the Council of a Municipality power to decrease the width of a road.

THIS was a demurrer to the defendants' statement of defence in an action by the Attorney-General for the Colony of Queensland, at and by the relation of Thomas Finney against the Shire Council of Toowong, whereby the plaintiff claimed an injunction to restrain the defendants from obstructing or continuing to obstruct a certain alleged public highway called the "River Road" by erecting or permitting to remain thereon a certain building which was in course of construction by the defendants.

The plaintiff by his statement of claim alleged that from a time antecedent to the foundation of the Colony of Queensland and thenceforth to the present time there had been and of right ought to be a common and public highway called the River Road along the bank of the Brisbane River, and separating allotments 17, 18, 19, 20, 21, 22, 23, and 24, and other allotments in the parish of Enoggera, in the county of Stanley; from the Brisbane River, and over which said highway all persons could and of right were entitled to pass and repass and have access to the river, and that by the construction of the said building the defendants were wrongfully obstructing the said highway and were causing injury to the relator and to the other inhabitants of the said Shire of Toowong.

The defendants, as a defence to the action, relied on sect. 237 of the "Local Government Act of 1878," which provides amongst other things:—

That the Council of every municipality shall have the care construction and management of all public highways streets roads &c. within the municipal district and may from time to time open new streets or roads or divert any street or road or alter or increase the width of any street or road &c.

and they alleged that in the exercise of the power conferred upon them by the said section of the said Act as the Shire Council of Toowong they altered the width of the said road and made the same 53 feet wide, and that the building complained of was erected between the said road so altered and the River.

The plaintiff demurred to the said defence on the grounds that the defendants had no power under the said section to diminish the width of the said road.

Griffith, Q.C., and *Dickson* appeared for the plaintiff; *Real* and *Byrne* for the defendants.

Griffith, Q.C., submitted that, *prima facie*, every one had a right to go over any part of a highway, and that although the Government had power to alter a road they could only do so where it was necessary. He cited *Marshall v. Ullswater Steam Navigation Company, L.R., 7 Q.B., 166*, and contended that the word "alter" in the said section did not give the Council power to diminish the width of a road, and that the contention of the defendants involved their right to build a row of houses all along the river bank.

Real submitted that the question for the Court was the construction to be put upon the words of the said section. He referred to *Phillips v. The London, Brighton, and South Coast Railway Company, 4 Giff., 46*, and to *The Queen on the Prosecution of the Ecclesiastical Commissioners for England v. The Wycombe Railway Company, 8 B. & S., 259*, as to power given to divert a road, and he contended that power was given to the defendants to alter the width by diminishing, and that the legislature had given them such power, expecting them to exercise the same properly, and if they exercised the power improperly the Government had, by sect. 245 of the said Act, reserved to themselves a right to take the road out of their hands, and he submitted that there was nothing in the Act to prevent the construction contended for.

Griffith, Q.C., replied.

HARDING, A.C.J.:—This is an action by the Attorney-General *ex relatio* Thomas Finney against the Shire Council of Toowong, claiming an

injunction to restrain the defendants from obstructing a highway called the River Road, by a building or otherwise obstructing the free passage of persons passing over and along the said highway or any part thereof. The right to this relief is claimed under the following circumstances:—the plaintiff is a resident of Toowong on land abutting on the highway adjacent to the building, the defendants being the Corporation of the Toowong Shire Council, under the provisions of the *Local Government Act of 1878*. The River Road is a highway which from a time antecedent to the foundation of the colony up to the present has been and of right ought to be a common and public highway along the bank of the Brisbane River, separating therefrom certain allotments of land. Over this highway all persons could and of right were entitled during all times to pass and repass and to have access to the river at their free will and pleasure. The defendants lately erected a building for their own use on a part of this highway and thereby wrongfully obstructed the highway. By reason of the premises it is asserted that injury has been caused and still is being caused to the relator, the owners and occupiers of lands abutting upon the said highway, and to every inhabitant of the Shire, and to every person desiring to use the road. To that, the plaintiff's case, the defendants answer by setting out portion of section 237 of the *Local Government Act*, 1878. Why they have set out the enactment of an Act of Parliament I scarcely understand—at all events they have, and I think, improperly; I do not think it has any right there at all. They say that the road at the place is within their district, and in the exercise of the power conferred upon them by that section they altered the width of the road and made the same 53 feet wide, and that the building is erected between the road so altered and the river, and that the same does not interfere with the rights of the public in any way whatsoever. I do not think that last statement is admitted by the demurrer "the same does not interfere with the rights of the public in any way whatsover." That is a question of law. The demurrer only admits such parts as were pleaded, consequently, I do not think it is admitted by the demurrer. The plaintiff says to that, that it is not a good defence, and it is bad because the defendants had no power or authority under the 237th section of the *Local Government Act*, or otherwise, to restrict or diminish the size of the highway. The case has been carefully argued and it entirely depends upon the construction of section 237. Bearing in mind that all the statements in the plaintiff's statement of claim as pleaded were admitted for the purpose of the present argument, and that I have stated them as I considered them to be admitted for the purpose of to-day, we have a piece of land running parellel with the river and which has been dedicated to the use of the public as a highway; and the Brisbane River being a navigable river is in the same position as all highways, namely, the public have a right of passing backwards and forwards thereon without question in the direction of the road, and off and on from the highway wherever they can do so without trespassing on the property of adjoining owners. Consequently, we have two parellel highways—one the road, the other the river, and between these highways, no private rights existing, and during the whole length of their running alongside of each other a right to pass and repass on every spot from one to the other free from obstruction. Again, along the side of the road the public had the same rights, and each of the adjoining owners had a right from every inch of his property to leave his property and betake himself to the road. Now the consequence of the step taken by the Council is that the connection of the road with the river, forming a parellel highway and waterway has been severed, and the road has been left at a distance from the water. Consequently, if the Municipality had a right to do this, they have closed the right of passing and repassing from the river to the road entirely along this bank, whatever distance this may be. For it may be one inch or may be ten miles, we do not know, but they have closed that right, and that that right is a right which the public have is admitted, and

therefore it is an interference with the right of the subject, and the Act which gives them the right so to interfere must in my opinion speak plainly and distinctly, and if there be two ways of construing the Act—one way which does and the other way which does not interfere with that right, the one allowing them to interfere will not be the construction adopted. It is a common law right, the right every man has as a native of the country, and to deprive him of that right the Legislature must speak out plainly. Therefore, to solve the question we must see if the Legislature has spoken out plainly. The way it has spoken is in section 287 :—

> The Council of every municipality shall have the care construction and management of all public highways streets roads bridges culverts ferries wharves and jetties within the municipal district and may from time to time open new streets or roads or divert any street or road or alter or increase the width or cause to be raised or lowered the ground or soil of any street or road and may for such time as may be necessary for that purpose close such street or road or any bridge thereon.

Now to criticise that technically the first power is from time to time to open new streets or roads or divert any street or road. Now, in order that a municipality may have the power of opening new streets or diverting streets or roads they are made authorities who may take lands under the *Public Works Land Resumption Act*, which Act provides for the compulsory purchase of lands from the owners, and the dealing with these lands after they have been compulsorily purchased. So that, for the purpose of opening new streets or roads, or diverting any street or road, the municipality has ample power of purchasing and providing themselves with the soil upon which they can open, construct, or divert their streets or roads. So also to alter or increase the width of a street or road. They have thereby the power to acquire land for the purpose of widening or causing to be raised or lowered the ground or soil of any street or road. Again, it will be further seen that they have power to make sewers through private lands, and on making them they must compensate the owners either for the injury done, or for the passage of the sewer through the land. Again, if a road is to be closed provision is made for it, in one case, under the *Crown Lands Alienation Act of 1866*, ss. 65, 66, there is a provision for closing unnecessary roads required for access to lands only owned by owners adjoining the road and not otherwise required for public use. Notice of the intention to close has to be given and at the expiration of a certain time, the Governor in Council may approve of the modification, and if the Governor in Council approves of it, and consents to the closure of the road upon the payment of a price he thinks reasonable, a deed of grant of the soil is to be granted to the owner or owners of the adjoining lands. There we have one means of closing a road. Next, by the *Streets Closing Act of 1861*, there is power where a road or street within a town is not required, or cannot be conveniently used, the Governor in Council, with the advice of the Executive Council, may, after certain notices and certain steps have been taken, and after the expiration of a certain time, grant the land contained in such road upon payment of the fair value thereof, to the owner or owners of the adjoining land in fair proportion as may be agreed upon. Then you have the case provided for in which a street is closed temporarily. So that if you read this section 287 of the *Local Government Act* as implying a power to open new streets, to divert streets, or to increase the width, you find every case provided for. If you go further than that, and construe it so as to give a power to decrease the width, you do not find any provision made as to what is to become of the soil of the land by which the road is diminished. If it is to remain as it was before, and the parties are to have access, ingress, and regress to the road it still remains a road. But if such access, ingress and regress is closed, a man whose land is on the other side may be actually debarred from leaving his house without committing a trespass. Supposing he lived on a four-sided allotment, on three of which sides other people's land adjoined, and the fourth previously facing the road was closed in, he could not come out without committing a trespass. That is the construction we are forced to adopt if we do not allow this demurrer. I think that construction so far as I can see, would operate as a

great hardship, and produce an absurd result. The Legislature is always to be credited by Courts of Justice with enacting that of two things which would not operate as an absurdity. I think, there exists no power to narrow this right. This is one of the cases in which the matter has been brought on by demurrer, which does not necessarily dispose of the case, so it appears to me, and consequently I should like to hear a few observations as to costs; it does not dispose of the whole matter, and consequently might have been held over until after the trial of the facts.

Pring, J., concurred, and after a few remarks from counsel on either side the demurrer was allowed.

Solicitors for plaintiff, *Wilson & Wilson.*

Solicitor for defendants, *Macpherson.*

FOXTON AND ANOTHER V. THE INDOOROOPILLY DIVISIONAL BOARD.

Rates.—Divisional Boards Act of 1879 and the Divisional Boards Act Amendment Act of 1882.

Where a portion of land having been surveyed and cut up into allotments still remains unoccupied and unalienated the Divisional Board within whose district such land lies cannot treat each of the allotments into which the said land has been divided as a separate rateable property, but they must treat the same as one property and rate it as such.

This was a special case stated under the 62nd section of *The Divisional Boards Act of 1879* (43 Vict. No. 17).

The appellants were the registered proprietors of eighty-nine subdivisions of land in the county of Stanley and parish of Moggill, being the whole of the subdivisions of sections number 1 to 7 inclusive of portions 14 and 15 in the said parish of Moggill and county of Stanley with the exceptions of six subdivisions, namely, allotments 1, 2, 3, 14, 15, and 16, of section 7, which were sold by Messieurs John Panton and Henry Buckley, the then owners thereof, who before the date when the land came into the possession of the present appellants lodged in the Real Property Office a plan of the subdivision of the said portions 14 and 15 into the said subdivision and sections, but the remainder of the said land has since the appellants became owners thereof always been and still is held and occupied by them as one estate or property.

2. In or about the month of April, 1883, the respondents caused valuations of the said several subdivisions to be made, and the appellants were assessed in the sum of three pounds (£3) in respect of the annual value of each of the subdivisions in paragraph 1, hereof mentioned.

3. The appellants, thinking themselves aggrieved on the ground of incorrectness in the said valuations, gave due notice of appeal to the justices sitting in the Court of Petty Sessions for the District of Brisbane holden at Brisbane, and being the nearest Court of Petty Sessions to the said division of Indooroopilly.

4. On or about the thirteenth day of June, one thousand eight hundred and eighty three, the matter of the said appeals was heard and determined before certain of Her Majesty's Justices of the Peace in and for the colony of Queensland, being the Justices then and there present, to wit:—Messrs. A. R. Jones, W. G. Power, A. H. Adams, and the said justices reduced the said net annual valuation of the said land in accordance with the evidence produced from three pounds to two pounds ten shillings for each of the said subdivisions.

5. On the hearing of the said appeals the appellants objected to the principle upon which the said valuations were made on the following grounds, that is to say:—

(1) That the whole of the said land was improved property.

(2) That the whole of the said land was used and occupied as one estate or property and should therefore be valued as such.

(3) That in the alternative each of the said sections 1 to 7 being a complete block of land should be valued as such without reference to the allotments or subdivisions into which the same had been divided.

The justices, however, overruled the said objections.

6. The only evidence taken at the hearing of

the said appeal was that of the appellant, Justin Fox Greenlaw Foxton, which was in the words or to the effect following, that is to say:—The land (meaning the land in paragraph 1, hereof mentioned) is not fenced, it is a disused coal mine, and improved property; it has been fenced. The whole property (meaning the whole of portions 14 and 15) are not worth (£150) one hundred and fifty pounds. It has been in the hands of John Cameron for several years for sale, but we have been unable to obtain that price for it. If the whole property were fenced in we could not get more than ten pounds a year for it. If the value now placed upon the property by the board is upheld we shall have to pay away in rates more than double the rent that can possibly be derived from it as it stands. Each allotment by itself is simply valueless.

The appellants, being dissatisfied with the decision of the said justices of the peace upon the objection raised by the appellants as to the principle upon which the valuation was made, gave due notice of appeal.

The questions for the opinion of the court were:—

(1) Whether the justices were right in overruling the objections raised by the appellants as to the principles upon which the valuation of the said land was made on all or any of the grounds in paragraph 5, hereof mentioned.

(2) Whether the principle upon which the said valuation was made by the respondents was correct, that is to say, whether the respondents were right in assessing the appellants in respect of each of the subdivisions in paragraph 1 hereof mentioned, and not in respect of the said land as a whole.

Griffith, Q.C., (*Byrne* with him) appeared for the appellants; *Real* appeared for the respondents.

Griffith, Q.C., referred at length to *Attorney-General v. The Mutual Tontine Westminster Chambers Associated Limited*, *L.R., 1 Ex. D. 469*, and to sect. 16 of the *Divisional Boards Act Amendment Act of 1882*, and contended therefrom that the Board's system of rating was wrong.

Real referred to sect. 59 of the *Divisional Boards Act of 1879* and to the Schedules thereto, and also to sect. 119 of *The Real Property Act of 1876*, and contended that a rateable property was one which had been properly divided and that the Board's system of rating was the correct one. He cited *Quinn v. The Registrar-General*, *Queensland Law Reports, 1879*, p. 7, to shew that the dedication of the roads was complete.

HARDING, A.C.J.:—This case comes up before us by way of appeal from the decision of the magistrates as to the rating of certain lands in the Indooroopilly Division by the Indooroopilly Divisional Board. The appellants appear to be the registered proprietors of a certain piece of land in the division which originally consisted of sections 1 to 7, in the parish of Moggill. Of these pieces of land the certificates of title appear to have been lodged in the Real Property Office together with a plan of subdivisions, and it appears that these subdivisions consisted originally of ninety-six. Of these, seven have been sold, and these seven appear to be all in one section. So that as it now stands the appellants are the proprietors of the residue of the land less the portions sold. So that as each piece was sold there was a residue and the portion sold, consequently there were two portions, and so it would go on, as each piece was sold up to the time that the last of the 96 was sold, and when the 96 were sold there would be 96 portions. But until the 96 were sold there would be just the number sold plus one. It is not necessary now to notice what would be the effect of the showing of roads upon the plan, whether it amounted to a dedication or not, all we have to decide is whether the principle of rating which the Board has adoped is correct or not. Now, the Board has said: By your depositing that plan in the Real Property Office, you have constituted 96 separate rateable properties. Whereas, I hold, and I refer particularly to secs. 48, 49, 50, and 119 of the Act, that they have left the property as it was, except as to the portions sold, that the moment one of the subdivisions was sold, they consisted of the same number of properties plus the one cut off, and so on till all were sold. Now, the Board having held

that there were 96 rateable properties rated each as of the value of £8 per year. The magistrates upheld the principle of that rating as to the extent of the number of properties rateable, although they diminished the amount of the rate, with which we have nothing to do. Leaving the effect of the *Real Property Act* in constituting these different properties, I go to *The Divisional Boards Act of 1879*, to section 59 to see what is rateable property. That section provides that all land shall be rateable property, with certain exceptions. There is little help to be got from that. I go then to the 60th and still find the words "rateable property." I go on to the 66th section for help, and I find there that "Every such rate shall be fairly transcribed in a book to be called the Rate-book, to be kept for that purpose, which may be in the form given in the Fifth Schedule or as near thereto as the circumstances of the case will permit." I go to that 5th Schedule and I find it a rude form, which provides, amongst other things, for the description of the "surname of the person rated," "name of owner of rateable property," and then "description and situation of rateable property." In that column would be placed the original Government portions sold. The next heading was "Subdivision (where division is subdivided)." Going from that to *The Divisional Boards Act of 1882* we find the section which has been said to raise this puzzle. I confess I do not see that it raises any puzzle at all, section 16 says, "Every rateable property," after you know what is rateable property, "shall, for the purposes of levying rates thereupon, be deemed to have been assessed at an annnal value of not less than two pounds ten shillings." Then there are Schedules 3 and 5 to this Act, which each give, I think, as far as schedules can assist us in giving an Act an interpretation, the interpretation which I am giving to it. You find no reference in Schedule 3 to the property, except by the number in the rate-book as given in Schedule 5 of the Act of 1879, which I have mentioned, so this 3rd Schedule gives no light. Then in Schedule 5 there is the same blank—"Notice is hereby given that the sum of pounds shillings and pence is now due and unpaid to the Division of for rates in respect of allotment No. , section (or portion) No. , situated in Street," still pointing to the original allotment and the alienated parts—so that I think so far as we get assistance from the schedules, it goes to shew that "rateable property" means separate holdings, using the term in a popular sense, what any man holds separately. Here, each part sold is held by different people, and the part that remains is according to the number of the remaining owners held by them in entirety or separately. For the purposes of to-day it is sufficient to say that the principle the Board have adopted, namely, that on the deposit of a plan at the Real Property Office dividing one allotment into 96 it becomes 96 different properties, is wrong. That is all I decide.

Pring, J.:—I am of the same opinion.

Case remitted to the justices, the appeal being allowed with costs.

Solicitors for appellants, *Foxton & Cardew.*

Solicitor for respondents, *Thynne.*

4th September, 1883.

BUNDANBA DIVISIONAL BOARD (APPELLANTS) *v.* BALLIN AND ANOTHER (RESPONDENTS).

Divisional Boards Act of 1879 (43 Vict. No. 17) sect. 53.

Under sect. 53 of the *Divisional Boards Act of 1879*, it is the duty of divisional boards to maintain their roads and bridges in a condition of repair sufficient to prevent danger to the lives and limbs of passers-by.

This was a special case stated under section 109 of the *District Courts Act of 1867*, on an appeal from the determination and direction of Mr. Deputy-Judge Mansfield, the Judge of the Southern District Court, upon the trial of the action at Ipswich, in this colony.

The facts and arguments appear sufficiently from the judgment.

Griffith, Q.C., and *Power* appeared for the appellants, and *Real* for the respondents.

Harding, A.C.J.:—The question in this case is raised upon an action tried before Mr. Deputy District Court Judge Mansfield, at Ipswich, on

the 21st August, 1883. The facts sufficient to raise the point seem to be, that the One Mile Bridge near Ipswich, was in the year 1879 handed over to the defendants, the Divisional Board of that district, under whose control it was jointly with another divisional board. That bridge has apparently not been interfered with. The bridge and rails have been maintained in the same state and condition as when placed under the control of the Board, the structure not having been altered. An accident occurred to the plaintiff, in respect of which the plaintiffs were damaged by the horse falling through the fence and injuring the wife of the plaintiff. The jury found that the defendants had been guilty of negligence and gave a verdict for the plaintiffs for £31 8s. At the trial Mr. Power applied for a nonsuit, on the ground that the said bridge (and especially the railing) was at the time when the alleged cause of action arose in the same state and condition as when the Board was created, and that the said Board had fulfilled their duty in maintaining the said bridge and railings in the same state and condition as when the same were placed under control of the Board by the Government of Queensland, without altering the structure of the said bridge and railings, within the meaning of sec. 53 of the *Divisional Boards Act of 1879*. The learned judge refused to nonsuit and reserved two questions for the consideration of this court, namely: "(1) Should the learned judge have granted a nonsuit? and (2) should he have directed the jury that if they were satisfied that the Board had maintained the bridge and railing in the same state and condition as when the Board was created and took control over the same, and if they were satisfied at the time the alleged cause of action arose that the bridge and railing were in such same state and condition as aforesaid, there would be no negligence on the part of the Board, and the jury should find a verdict for the defendants?" Was it the duty of the Board to do nothing in respect of that bridge, and leave it to become ruinous or dangerous or otherwise? The whole matter turns upon the 53rd section of the *Divisional Boards Act of 1879*, which provides that—

> The duties of every such board shall be to construct, maintain, and control all public highways, roads, streets, bridges, ferries, wharves, wells, reservoirs, and other necessary public works within the division, and in carrying out the objects and purposes of this Act, to expend such moneys as may from time to time be raised by rates, or otherwise placed to the credit of the divisional fund.

That is sufficient of the section to read and we have not been assisted by having our attention drawn to other sections of the Act. Now, a strong argument has been made before us, first of all, as to the inconvenience which would result from a construction of that Act which would make it the absolute duty of a board to maintain actively the bridges. In answer to that it seems to be sufficient to quote from the judgment of the Privy Council, in the case of *The Borough of Bathurst v. Macpherson*, 4, *App. Cases*.

> There are no doubt *dicta* to the effect of the inconvenience that might result from the multiplicity of actions and increase of litigation if it were held that every individual aggrieved by the non-repair of a public road might sue either the county, or parish, or individual members of it; but such inconvenience was never admitted as a reason why an action should not be maintainable.

So much, then, as to the argument of inconvenience. Then there was another argument—that before the passing of this Act a person using a highway had no action against anyone for damage caused by non-repair, and that by the passing of the *Divisional Boards Act* it was not the intention of the Legislature to create a new remedy. That argument was supported by a number of cases which depend upon the fact that a newly constituted body had transferred to them the position of some pre-existing, non-liable body. In this case although roads were patched and otherwise dealt with there existed no person whose duty it was to maintain them, and no action would lie against anybody. That being the case, no duty or obligation was taken over or transferred. therefore, it cannot be said that boards created by this Act had any duty, right, or obligation transferred to them, but on the contrary a new duty or obligation was created. Then why might it not have been the intention of the Legislature to create a new remedy? They created a new body with a new duty—and why not a new remedy for a breach of that duty? Now this

action is for non-maintaining. According to my view, similar to that of the judges of New South Wales in respect to the Act there, that the Act casts upon the board the duty to keep and maintain the bridges within the boundaries of their division in such a condition of repair as to prevent danger to the lives and limbs of passers-by. We are only concerned now with bridges. If it is necessary that the same ruling which applies to bridges should apply to roads all over the colony, I do not know that that will interfere with the right construction of the Act because of the largeness of the question to be dealt with. But certainly with regard to all matters not being natural obstructions, or matters which interfered with the natural construction of the roads, I think that the Act casts upon the boards taking over these altered roads the duty of maintaining them in a condition of repair sufficient to prevent danger to the lives and limbs of passers-by; and I think this section 58 using the word "shall" as imperative imposes an obligation on the board. Whether or not they would be indictable for non-repair I do not decide, but if there exists a duty under an Act I think an action for its breach lies. The case of *The Borough of Bathurst v. Macpherson* has been cited and commented upon on both sides, and I think the decision at which I have arrived is the necessary result of that case, and that I am following it, and that I am bound by it. True, it was not necessary to go so far in that case as I have gone, but that case went to the step immediately preceding the step I take in this decision, and I think it is foreshadowed in that case, that when the necessity for it arose, that would be the decision. At the end of the case their lordships said:—"It will be very desirable, in their lordships' opinion, that the attention of the Legislature should be drawn to the difference of opinion which exists as to the construction of the Act, with reference to the general liability to repair, in order that they may, if they deem it expedient, set the matter of their intention at rest for the future." The Legislature of this colony has used a positive word "shall" which is equivalent to "must" by our *Acts Shortening Act*. If they did not mean that, it is in their power to alter it. Until they do that I shall hold that it is the duty of divisional boards to maintain their roads in the state I have laid down, and the two questions will be answered so as to support the learned judge's ruling—namely, in the negative, and the respondents will get their costs.

PRING, J., concurred.

Solicitors for appellants, *Foxton & Cardew*, Brisbane and Ipswich.

Solicitor for respondents, *O'Sullivan*, Ipswich.

THE MUTUAL ASSURANCE SOCIETY OF VICTORIA *v.* THE REGISTRAR-GENERAL.

The Real Property Act of 1861 (25 Vict. No. 14).—Foreign Company.—Land.

Where a foreign corporation seeks to register a transfer to them of land under the *Real Property Act of 1861*, it is the duty of the Registrar-General to registrar such transfer, and if the parties concerned afterwards come to dispute it is for them to carry such dispute to courts of law. It is not the duty of the Registrar-General to take such dispute into consideration.

THIS was a motion to make absolute a rule *nisi* for a writ of *mandamus* which had been obtained by the plaintiffs, on the grounds—(1) That the Mutual Assurance Society of Victoria, being duly incorporated according to the laws of the colony of Victoria, and entitled to hold lands in that colony, were also entitled to become the registered proprietors of, and to hold lands in Queensland. (2) That the Registrar-General was not warranted in refusing to register the said memorandum of transfer.

Garrick, Q.C., and *Power* appeared to move the rule absolute; and *Griffith*, Q.C., and *Real*, to oppose the motion.

Harding, A.C.J., raised the preliminary questions: "Whether the Court ought to go into the matter at all, that is, whether the Registrar-General ought not to register, leaving it to anybody interested to take action in the matter afterwards; and whether the duty of the Registrar-General was anything more than ministerial?

Griffith, Q.C., contended that it was, and that, as the registering was the preliminary step

towards issuing a title, it was the duty of the Registrar-General to see that the transfer was only made to a competent body.

Garrick, Q.C., said that his side were anxious to have the real question tried, and with that end in view he asked leave to amend the rule so as to command the Registrar-General not only to register but also to make out and issue to the said Company a certificate of title to the said land.

The arguments of counsel were entirely directed to the preliminary questions raised, and the said arguments and the grounds of judgment upon which the case was decided appear sufficiently from the judgment.

HARDING, A.C.J.:—Recently application was made to the Registrar-General by the Mutual Assurance Society of Victoria to register a transfer of land to the Company. At the time that application was made he was informed, and we now have evidence of the fact, that the Company is a corporation according to the laws of Her Majesty's colony of Victoria. The registration of that transfer was refused by the Registrar-General, and the following memorandum was given as the reason for his refusal:—"Transfer is in favour of a corporation which depends for its existence upon the statute of another colony, and the recognition of this corporation by the law of Queensland is not such that would enable it to hold an estate in land." The corporation were dissatisfied with this action on the part of the Registrar-General and applied for and obtained a rule *nisi*, returnable before this court, calling upon the Registrar-General to shew cause why a writ of *mandamus* should not issue commanding him to register that memorandum of transfer, upon the grounds—"(1) That the said society, being duly incorporated according to the laws of the colony of Victoria, and entitled to hold land in that colony, is also entitled to become the registered proprietor of and to hold lands in Queensland; and (2) that the said Registrar-General was not warranted in refusing to register the said memorandum of transfer." That rule *nisi* has been moved absolute before us and cause has been shown. The transfer is admittedly in the form required by *The Real Property Act* and the regulations made thereunder. The Act provides a scheme for the registration of land in this colony, and the particular sections to which I shall refer will be, the 33rd, which requires the Registrar-General to keep a register-book; the 34th, which requires that—"Every land grant and certificate of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act so soon as the same shall have been marked by the Registrar-General with the folio and volume appertaining to it in the register-book and every memorandum of transfer or other instrument purporting to transfer or in any way to effect land under the provisions of this Act shall be deemed to be so registered so soon as a memorial thereof shall have been entered in the register-book upon the folium constituted by the existing grant or certificate of title of such land." And then it proceeds to give certain directions as to what is to be entered. Sections 35 provides that—"So soon as a memorial thereof shall have been entered in the register-book every instrument drawn in any of the several forms provided in the schedule hereto or in any form which for the same purpose may be authorised as herein provided shall for the purposes of this Act be deemed and taken to be embodied in the register-book as part and parcel thereof and any such instrument when so constructively embodied shall create and impose the like obligations on the persons signing the same and for the like period of time as if the same had been sealed and delivered and every such instrument presented for registration shall be in duplicate and the Registrar-General upon registration thereof shall file one original in his office and shall deliver the other to the person entitled thereto." Then section 48—"No instrument shall be effectual to pass any estate or interest in any lands under the provisions of this Act or to render such land liable as security for the payment of money until such instrument shall have been registered in accordance with the provisions of this Act but upon the registration of any such instrument the estate or interest intended to be thereby granted or conveyed shall pass" &c.

Then the 48th, 49th, and 50th, which relate more particularly to transfers. Section 48 says "When land under the provisions of this Act is intended to be transferred the transferror shall execute a memorandum of transfer in form D of the schedule hereto and every such memorandum shall be attested by a witness and shall for description of the land intended to be transferred refer to the grant or certificate of title of such land or shall give such description as may be sufficient to identify that particular portion of land intended to be transferred and shall contain an accurate statement of the estate or interest intended to be transferred and a memorandum of all mortgages and other encumbrances affecting the same and if such land be leased the name and description of the lessee with a memorandum of the lease." Section 49,—"If any such memorandum of transfer purports to transfer an estate in fee simple in the whole or any part of the land mentioned in any grant or certificate of title the transferror shall deliver up the grant or certificate of title of the said land and the Registrar-General *shall* in such case enter on such grant or certificate of title a memorandum *cancelling* the same either wholly or partially according as the memorandum of transfer purports to transfer the whole or part only of the land mentioned in such grant or certificate of title, and setting forth the particulars of the transfer to be effected. Then section 50,—"The Registrar-General upon cancelling any grant or certificate of title either wholly or partially pursuant to any such transfer shall make out to the purchaser or other registered transferee a certificate of title to the land mentioned in such memorandum of transfer and every such certificate of title shall refer to the original grant of such land and to the memorandum or other instrument of transfer to the purchaser or other registered transferee thereof" &c. By the fifth subsection of section 11, the Registrar-General "may enter a caveat on behalf of the Crown or on behalf of any person who may be absent from the colony or who may be under the disability of infancy coverture lunacy or unsoundness of mind to prohibit the transfer or dealing with any land belonging to or supposed to belong to the Crown or any such absentee or person under disability as aforesaid or on behalf of any person whose rights may appear to him likely to be endangered or compromised." So that by these sections a scheme appears to have been established of a register-book kept by the Registrar-General, in which all matters are registered, and when these matters are registered the title under the Act accrues. All documents have to be registered. All transfers have to be in certain forms, and being in those forms have to be certified as correct for registration. When these transfers are registered, and not before, the land is affected. The effect of registering these transfers is the same as the delivery of a deed of conveyance. With respect to this matter, in the case which I referred to before and which I endeavoured to induce the representatives in court of the Registrar-General to notice and criticise, but which I could induce neither of them to do, further than to confess that they were fully acquainted with the case—the name of the case is *Roxburgh & Others*—in the course of the argument Mr. Justice Lutwyche asked,—"Can he say that this is not a bill of mortgage?" The Attorney-General: "That is what he does in reality, and that is the reason why he has refused to register it." Mr. Justice Lutwyche: "That would seem to me to be a legal question—Whether the instrument had any operation as a mortgage." That is the question here, and the whole judgment of the court was to the effect that when a legal question arose it was not for the Registrar-General to decide it. Of course, there are cases such as transfers in blank, or any evident hoax, where the Registrar-General would be wrong to place it on the register, but, when *bonâ fide*, I always thought it was the Registrar-General's duty to see that it was in form, and not to act as judge. Now, it is said that this is not a transfer because there must be a transferee to every transfer, and the person named as transferee is a corporation. In the last paragraph of the 3rd section—the interpretation clause—it is set forth that "every word importing the masculine gender only shall

extend to a female and shall include a *body corporate*," consequently this Act naturally includes bodies corporate. Then, when the transfer is registered what questions arise? There may be three questions:—Can the transferee take land; can he take and hold the land; or, is he utterly incapacitated. These three propositions are dealt with by *Sugden*, chapter 20:—"This incapacity is of three kinds: 1st,—an absolute incapacity; 2ndly—an incapacity to hold, although an ability to purchase; and, 3rdly—an incapacity to purchase, except *sub modo*." [His Honour here gave examples under each head, quoting from the author.] If this were a native corporation, the question might arise, whether that corporation could take, it also might arise, whether that corporation could hold —Now, it has been stated at the bar what a corporation is. I think a corporation is sufficiently defined by stating that it is an artificial person recognised by law as having a certain *status*. *Grant, on Corporations*, at page 98, says,—"It has been laid down generally that a corporation aggregate has an incident power to purchase land and goods." Authority for this is to be found in every text book you take up. In *Stephens Commentaries*, vol. 1, p. 454, of the 4th edition, we find—"By the Common law, a corporation is as capable of purchasing lands as an individual." Now when a matter arises in this court we assume that our own law applies until it is shewn that the foreign law is different to that, consequently, when a corporation is shewn here to be a corporation according to the laws of the country it comes from, I take it, that we properly assume that it has the same power our corporations have, namely, that of purchasing land. Whether they have the power of holding it is another question. An alien has the power of purchasing land but not of holding it, and a very difficult question might subsequently arise, whether or not a corporation not being a corporation incorporated by the laws of the colony where it had acquired land could hold them, and the consequence of its being registered. But until the Registrar-General registers the transfer the effect of the transfer is *nil*, and the question could not arise, and that question, in my judgment, cannot be argued between a person seeking the registration and the Registrar-General. He is not interested in the matter. But there are others interested in the matter if the transfer is void. He has in order to register that transfer to cancel the previous title, and then a question arises between the transferror, the Crown, and the corporation, as to in whom is the land. One reading of the law may be that the effect of cancelling the title and the transfer being void would be that there was no title other than the original title of the Crown. Another may be that the act of the Registrar-General is a nullity and does not cancel the title, and being a nullity it has never been cancelled at all and the title remains in the grantor. Another may be that the land has been taken by the corporation by the registration of the transfer, and that thereupon, they being unable to hold it it reverts to the Crown. All these points can be raised and litigated between the parties if the proper course is taken after registration, but before registration, the case is simply as stated by Mr. Justice Lutwyche—"that would seem to be a legal question." That case was very lengthily argued by the present Chief Justice, myself, and Mr. Justice Pring, before Sir James Cockle and Mr. Justice Lutwyche. The Chief Justice, after a little bit of criticism of the argument as to whether a *mandamus* would lie or not, goes on to this part of the case, as to what would be the effect of their refusing the *mandamus*—"he knew indeed, practically speaking—he did not mean to say, in the colony, but in other places—that all due haste was used in the registration of deeds, or the whole property might be imperilled. That being so, the court could not conceive that they were exercising any other than a salutary jurisdiction in letting the *mandamus* go. What would be the effect of their refusing? Why, to place the bulk of the property —certainly the bulk of the property depending upon realty, at the absolute discretion of the Registrar-General. Far be it for the judges to desire to extend unduly the power of the courts of law. If it were the intention of the Legisla-

ture of the colony to transfer the decision of questions of realty to the Registrar-General, he did not know that the court would make any great objection. It would certainly relieve them of one of the most anxious and difficult class of cases which came before them, for no class of questions gave him greater trouble than those which were brought before him under *The Real Property Act*; he thought he could say the same to some extent of his learned colleague's experience. If, therefore, it became the wish of the Legislature, and satisfactory to the public, that the whole disposal of the realty of the country should be left to the Legislature and the Registrar-General, they would cheerfully resign the consideration of all such questions to them. But at present it was necessary for the court to discharge that duty, and to see if the discretion said to be vested in the Registrar-General, was exercised in conformity with the law. It was said at first, that there was an absolute discretion vested in him. The court could not, however, find anything of that kind in the Act." And that applied to the section relating to mortgages, and I think every word of it would have been applied if their Honors were still on the bench. Mr. Justice Lutwyche says—"He had previously intimated that he thought the 56th clause mandatory in its terms. The only question, it appeared to him, was, whether the bill of mortgage was such a bill of mortgage as that described in a previous part of the section. First of all, it must be executed in form F, and must contain a statement of the estate and interest intended to be mortgaged. It must refer to the description given in the grant or certificate of title of the land in which such estate or interest is held, or shall give such other description as may be necessary to identify such land, together with a statement of all mortgages, and every encumbrance affecting the same, and must be attested by a witness, and be registered in the order and time in which the same is produced to the Registrar-General for that purpose." Just the same provisions as in the case of a transfer.—"That clearly appeared to throw upon the Registrar-General, when those provisions had been complied with, a ministerial and not a judical duty. It was for him to register the instrument and if the parties concerned afterwards came to disputes, they could carry their quarrel to courts of law. It was not for the Registrar-General to take such questions into consideration." I think Mr. Garrick's application to amend the rule must be refused, and that the rule must be made absolute. Upon the second ground I find it unnecessary to express any opinion further than I have upon the capability of corporations to take and hold land. These questions are left for subsequent decision. I have had to touch upon them to some extent but this is only a decision upon the second ground, and the rule must be made absolute with costs.

PRING, J.:—I think this rule for a *mandamus* must be made absolute on the second ground. I do not wish to offer any opinion on the question which has been well argued before us as to whether a corporate body, incorporated by Act of Parliament in Victoria and not here, can hold lands in this colony. I expressed my opinion that that was not the question we were called upon to decide on *mandamus*. It appears to me that *The Real Property Acts* contain a scheme for the transmission of real property in this colony and certain officers are appointed to discharge the duties connected with that scheme, the principal one being the Registrar-General, but he cannot depart from the provisions of the statutes one *iota*. All he has to do is to perform his duties according to law. Section 11 contains five subsections which confer certain powers upon him. Some of these powers he may exercise judicially. The section referred to by Mr. Justice Lutwyche, the 56th, is a mandatory one, and uses the word "shall", and upon reference to the 48th, 49th, and 50th sections referred to by The Acting Chief Justice we find the same word is used. The question whether the Registrar-General was bound to register certain documents, if made in the proper form, is exactly the same as that raised in the case of *Roxburgh*, and, as stated by the Acting Chief Justice, if he refused to register a document in proper form, he would be

exercising judicial functions. I was much impressed with that case and it appears to me that the arguments used by the present Chief Justice are apposite to this case, and I quote them:— "From the position taken by his learned friend it would seem that the Registrar-General entirely misconceived his duties under the Act. He claimed that the Registrar-General, instead of performing his almost purely ministerial functions under the Act of registering instruments and leaving their interpretation to courts of law and equity, had the right to constitute himself a court of law and equity, and to determine, before any such questions were raised, the rights and interests of the parties interested. Such a thing was monstrous. If that were permitted he would go still further and claim to know the intentions of the parties; he would dictate to them the rules they must observe, and the circumstances they must provide for, and the modes of contract they should enter into, before he would register under the Act. It had been stated by Lord Campbell, in a cased reported in the *19 L.J., Q.B., p. 537*, that if a memorial were strictly in conformity with the Act, that a Registrar could not refuse to register it; and in another case a writ would have issued had not the Registrar promised to do what the writ was sought to compel him to do." That is the language of the present Chief Justice, and I cannot in better language express my opinion of the Registrar-General's action in the present case.

Solictors for applicants, *Hart, Mein & Flower.*

Solicitor for Registrar-General, *Crown Solicitor.*

9th October, 1883.

SHAW AND CO. *v.* HOUSTON.

The master of a vessel is not bound to accept in lieu (either wholly or in part) of his lien for general average upon goods carried by him, the bond of the consignees of such goods, or to accept any other security except such as he thinks reasonable and proper upon the statement of adjustment to be payable by the consignees or owners.

THIS action was commenced on the 29th day of August, 1883, by a writ of summons, whereby the plaintiffs claimed against the defendant for that the defendant converted to his own use and wrongfully deprived the plaintiffs of the use and possession of the plaintiffs' goods shipped by the plaintiffs in the steamship "Teviotdale," of which the defendant was master, and for £500 damages for their detention, and the parties afterwards concurred in stating the question of law arising therein for the opinion of the Court. The question for the opinion of the Court was "whether the plaintiffs were at the commencement of the action entitled to the delivery of the goods."

The facts of the case, the arguments of counsel, and the cases cited, appear sufficiently from the judgment.

Power and *Rutledge* appeared for the plaintiffs; and *Griffith, Q.C., Garrick, Q.C.*, and *Real*, for the defendant.

HARDING, A.C.J.: Neither myself, nor my brother Pring, think it necessary after the time taken by the argument, and the opportunity afforded us since the adjournment of the Court yesterday to take further time to consider our judgments, I consequently proceed to deliver my judgment in the case. The question arises upon a special case stated in action, in which Alfred Shaw & Co. are the plaintiffs, and Crawford Houston is the defendant. The plaintiffs are the owners and consignees of goods of large value, which goods were shipped on board the ship "Teviotdale" together with other goods, as a general ship, of which the defendant was the master. The voyage was to Brisbane. During the voyage certain casualties occurred, which have now raised the question of the liability of the goods to generally average, which liability is admitted. The amount of that liability is not ascertained, and it appears that it is not ascertainable for some considerable time. Under these circumstances, the plaintiffs were desirous of obtaining their goods, and requested delivery of them by the defendant, and in order to satisfy the defendant for what they considered to be the requirements of the law, to enable them to insist upon the delivery, at the time of their demanding the goods they tendered to him what has been termed a general average bond; it is stated at

length in the special case, and is, as I have been informed by Mr. Power, in the common form recommended by *Abbott on Shipping*. At the same time they also tendered an assignment and deposit of certain policies of insurance insuring large amounts. The defendant did not accept, but offered to deliver the goods, an offer only, defendant did not make it with a condition to the effect that he would deliver the goods on no other terms, but offered to deliver the goods upon the plaintiffs making a deposit of one-third of the value of the goods and entering into a certain agreement. In the case the defendant says, that the amount payable on the average adjustment will be one-third of the value of the things liable to contribute. The agreement tendered by the defendant to the plaintiffs for execution is, as I am informed by Mr. Griffith, a form approved of by the London Underwriters' Association, which has been in use for some time before, and since the year 1882, and himself offered to execute this agreement, which contains agreements to be performed on the master's part as well as on the part of the consignee or owner of the goods. It is unnecessary for the purposes of this case, to analyse the form of this agreement, probably it is sufficiently well known in mercantile circles. The plaintiffs then state that the amount payable by the owners of goods when the general average shall be adjusted, will not exceed one-sixth of the value, and the defendant having refused to accept their previous tender, re-tendered as before, and in addition thereto a sum of £434, being a one-fifth of the estimated value of the goods of which they were owners or consignees, which money was to be held by the defendant as security for the payment of the average adjustment to be found due from them; but the defendant still refused to deliver. These are the facts of the case, and the plaintiffs and the defendant have stated their contention arising thereon for the consideration of the Court in the 8th and 9th paragraphs respectively. The plaintiffs contend that they, as consignees, are entitled to have the goods delivered to them on tendering to the master, shipowners, or agent, their bond or agreement to pay whatever may be found on adjustment to be payable by way of general average in respect of goods. The defendant contends that he is not bound to accept in lieu (either wholly or in part) of his lien for general average upon the goods, the bond of the consignees, or to accept any other security except such as he thinks reasonable and proper, upon the statement of adjustment to be payable by the consignees or owners. Upon these two contentions the case submits the following questions:—Whether the plaintiffs were at the commencement of the action entitled to the delivery of the goods, if the court shall be of opinion in the affirmative then judgment is to be entered for the plaintiffs for £2202 13s., to be reduced to 1s. on the delivery of the goods to the plaintiffs with the costs of suit; if the court shall be of opinion in the negative, then judgment is to be entered up for the defendant with his cost of suit. In other words if the court thinks the defendant's contention is right he gets judgment, and so if the court considers the plaintiffs' contention is a right one, the plaintiffs get judgment for the amount. I propose to consider the law and authorities which have been brought before us, and I propose first of all to consider what are the general rights of the holder of goods under a lien and the owner. In all cases the owner on tendering satisfaction for the debt, or subject of the lien, has a right to his property, and if the creditor refuses after that tender to deliver the goods, he does so at his peril, for if the tender is sufficient in amount he is a wrong-doer and answerable for his misconduct. Nor indeed is actual tender, strictly so called, necessary, if the person in whose possession the goods are has signified his refusal to accept the amount due. So that, in all ordinary cases in order to free goods from the lien, to discharge the right to detain them, a tender of sufficient satisfaction of the debt in respect of which they are detained, must be made, that is to say, a tender must be made of something that will pay the debt, that will discharge it, not of that which will secure it, because the creditor has already security by reason of his lien. If, of himself, he

likes to change the security which he has by his lien, and the right to detain the subject matter of the lien, his lien is gone, and the goods the subject of the lien are discharged. That I believe to be the universal principle applicable to all liens, as far as a general rule applicable to all subjects can be enunciated. Now in order that the plaintiffs may succeed, it is necessary for them to establish an exception to that general rule, to show that it is in the option of the debtor to force the creditor to give up his lien for something less, or something greater, as he may determine, not as the creditor who has the security may think fit, but as the party liable shall think fit, and in order to do this various authorities have been quoted to us. We have the authority of the case of *The Cargo Ex the Galam, 33 L.J. Ad. 97*, and the observations of Lord Kingsdown, at pages 102-4, and in that report the doctrine that the Master has at common law a lien on the cargo for general average, is laid down distinctly by the highest court to which this colony is subject, and by the decisions of which this court is bound. That case is as late as the year 1863. Other authorities were quoted for the position by Mr. Griffith, namely, *Molloy de Jur. Mar. vol. 2, p. 8*; *Beaus Lex. Merc. 244*, and citations from the text books which were relied upon by the other side. Now the first in order of date which the plaintiffs cited was *Abbott on Merchant Shipping*, 11th ed., 554. The subject commences at page 553, and I think it well to read therefrom. "By the civil law the master of the ship was required to take care to have the contribution settled, and to receive the sums to be contributed, and pay them over to the losers, and might sue and be sued for them, or might retain the goods for the sums to be contributed by their proprietors. - - - - In this country, which has no particular forum established for these matters, but in which the practice of insurance is very general, it is usual for the broker who has procured the policy of insurance to draw up an adjustment of the average, which is commonly paid in the first instance by the insurers without dispute. In case of dispute, the contribution may be recovered either by a suit in equity, or by an action at law, instituted by each individual entitled to receive, against each party that ought to pay, for the amount of his share. But a court of equity will not at the instance of the sufferer restrain the master from parting with the goods of the other merchants if he thinks fit to do so. And in the case of a general ship, where there are many consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted." As an authority for this, Abbott states in a note (*n*) that it was so "deposed by a gentleman very conversant with this business in the case of *Myer and Others v. Vander Deyl*, Guildhall, Sitting before Lord Ellenborough, Ch. J., Dec., 1803." So that in the whole of that paragraph you have first of all, the legal rights of the parties, each to sue each in a court of law and in equity, and a court of equity holding that it will not restrain by injunction the action of the master in respect of goods, then, as a contra-distinction to that, you have the usual practice, that a master does under certain circumstances, take a bond for the payment of the average when adjusted. Now, probably, and it is reasonable to suppose that the grounds and object of this usual practice were the difficulties in which the parties were. They might sue each other at law, or in equity, but in the meantime the master of the ship might do what he liked with the goods, these were their remedies, probably very inadequate. The position was, that the master having a lien on the goods could not part with them, and before the warehousing clauses in *The Merchant Shipping Act* were passed, the master had to keep the ship in order to keep the goods, and possibly, in order to enforce a very small lien, he might by the delay be incurring a very large expense. If, before the passing of these clauses, instead of keeping them on board, he landed them or stored them, or deposited them with a wharfinger, at common law his position was, if he had not by that act lost the possession of the goods on which his right of lien depended, at any rate, the cost of

storing and retaining the goods could not be recovered from the consignee, so that all the time he was losing money he could not recover from anyone. The position of the consignee was, that in all probability he had paid for the goods when he ordered them, or that his draft or whatever he had given in payment was becoming due, and he would not be able to use the goods in the ordinary course of his business, whereby, he not only lost the interest of his money and the actual use of those goods, but might be debarred from performing contracts he had entered into, and otherwise lowered in his position as a merchant or trader in the community by not having that stock of particular goods. The proceedings in law and equity being inadequate, it was distinctly to the advantage of the master and merchant to come to some amicable arrangement, and we find in *Abbott* that it was usually done by taking a bond from the different merchants for the payment of their proportions of the average, when the loss should be adjusted. The moment a bond was taken the lien was gone. It was usual, not obligatory, on the master to take the bond; if it was not obligatory, before he would give up his lien the bond or security given must have been to his satisfaction. Then what is the use of a custom or law growing up which states, that if one man gives another man a bond with which he is satisfied, his lien shall be gone. That is nothing more than the law applicable to all liens, and has been so from time immemorial, and if nothing has grown up the general law of liens applies. Now *Maclachlan* was cited, page 588 of the 1st edition, and the same paragraph as I have read from *Abbott*, as to the usual practice, is incorporated in the text without any authority for it. It is preceded by the direct statement, that the master's lien on the goods for the amount of contribution is at common law, and he may detain them until "it is paid," not until "the usual practice" is complied with, but until "it is paid." *Maude* and *Pollock* were cited to the same effect. In *Arnould on Marine Insurance*, third edition, page 823,—"Primarily, the sole parties liable are those upon whose respective interests the contribution has been assessed, namely, the owners of ship, freight, and goods, with right of action over against the underwriter. The master, for the recovery of these contributions, has a right to retain the cargo under common law lien, or enforce his claim by action at common law, or suit in equity." Then the marginal note of the next paragraph is—"Practice in case of a general ship," and the paragraph proceeds,—"In the case of a general ship and many consignees, the practice is for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average, when the same shall be adjusted." Giving as authority, *Maclachlan* only, as cited by me. *Maclachlan* slightly alters the phrase "it is usual for the master" to "the usual course," and *Arnould* varies it again to "the practice is." Here we have the authority of *Arnould* stating as the practice what one would expect, reading the statements in *Abbott* and *Maclachlan*. Then again there is the book usually found in the hands of the master, the master's handy-book—*Lee's Laws of Shipping*, at page 354 of the 9th edition.—"The captain or owners have a lien over the goods for the average contributions, and these, therefore, should be adjusted and settled before the cargo is landed or at least delivered."—There is good advice in a handy form for the travelling master of a ship, in short, stick to the goods until you get your money.—"Usually the adjustment is made by the broker, or, the documents and vouchers are placed in the hands of a professional average adjuster to prepare an average statement, by which the proportions payable by the different parties are fixed, and those parties enter into an average bond for payment of the proportions so fixed." The next case in date to that cited in the note in *Abbott*, was decided in 1811, *Hallett v. Bousfield*, in *18 Vesey, 191*, and that is the case which supports the proposition that a court of equity will not restrain the master from parting with the goods of the merchant if he thinks fit. It is the judgment of Lord Chancellor Eldon, at pages 190 and 191, to which I think it desirable to refer,—"This is a question of great import-

ance, as connected with the convenience or inconvenience which may be the consequence. It is impossible for me to say here, that parties are obliged to refer such claims to arbitration: neither will any principle justify the administration of law and equity according to the usage of *Lloyds'* Coffee-house. It seems to me also, as well as I recollect the text law upon this subject, that in such case there is a lien upon the goods of each freighter for contribution and average in some sense; that is, the master is not bound to part with any of the cargo until he has security from each for his proportion of the loss: but there is no authority that, on the ground that he has a lien to the extent of entitling him to call on every person to give security for the amount of their average when it shall be adjusted every owner of a part of the cargo can compel the captain to do so; and it strikes me, upon the short time I have had to consider it, that is a length the plaintiff cannot reach."—And it strikes me, in this case, that it is a length the plaintiffs cannot reach, that they cannot compel the defendant to give up the cargo upon the mere tender of security. To proceed with the judgment.—"The defendant it is true is a trustee for others: but the nature of the trust is regulated by the practice; and there is no instance of an action or a suit in equity to effectuate this lien otherwise than through the right of the master to take security; that practice ascertaining the true nature and extent of the lien. In the case of *Shepherd v. Wright Show, Parl. Cas. 18*, though the bill was dismissed, the court certainly meant to maintain the jurisdiction by personal process to compel the other owners to make contribution. As there is no trace of authority upon it except that case, I cannot without further consideration represent myself as master of the subject; but the strong inclination of my opinion is, that this lien cannot be carried further than I have stated. The bond that has been prepared is only for such average as shall be established by arbitration. They have no right to say it shall be tried in no other way." So far as that case goes, to my mind, it does not shew any exception to the general rule I have laid down, but, on the other hand, I should have very little difficulty from that case alone, to draw up a correct definition of the rights of the holder of goods under a lien, and his debtor, and I think that from that case alone that definition so drawn up would assimilate very closely to the definition I have given. The next case occurred in the year 1824, *Simonds v. White, 2 B. & C., 805.* The general principle decided is shortly stated in the marginal note,—"A loss by general average is to be calculated between owner of ship and the owner of goods according to the law of the port of discharge." The case was decided by *Abbott*, C.J., who delivered the judgment of the court, and I am going to read from page 811. "I believe also that all are agreed on another point; namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them shall be either paid or secured to his satisfaction." Now, if the statement in *Abbott*, of what was usual in 1803, had become so usual that it had become the common law of the land, we have the decision of the Court of King's Bench deciding that at that time this custom, which it has been contended had become the common law of the land, was a custom to retain the goods until the sum contributable in respect of them had been either paid or secured to the satisfaction of the master. From reading that case, it is perfectly clear to me that the lien could not be discharged by the debtor except he tendered sufficient money to pay the debt, or that the creditor was ready to accept such security as he offered, that is to say, the lien could only be discharged by payment, or by the creditor doing something inconsistent with his lien, namely, taking another security. The next case is in the year 1832, *Scaife v. Tobin, 3 B. & Adol., 523*, and is, as to the liability of a consignee receiving goods which had become liable to a general average contribution. Lord Tenterden, Chief Justice, at page 528, lays it down that "it is true that the master has a lien on the goods for general average, and if he had exercised that right, and informed the defendant that if he took the goods he must pay the general average, and

the defendant after such notice had taken the goods, there would have been an implied, if not express contract on his part to pay it." A case which, to my mind, does not render much assistance in the determination of the present point. The next case in order of date is that of *The Cargo Ex "The Galam," 33 L.J. Ad. 97*, in the year 1863. At page 103 I find Their Lordships stating—"The captain here does not say, I have by the maritime law a lien which the Court of Admiralty will enforce as it does in cases of bottomry and other cases not depending upon possession; but he says, I am in possession of this cargo, and have a lien upon it, and by the law of England no man has a right to take it out of my possession till that lien is satisfied. If he be right in law, as it appears that he is, how can the Court of Admiralty do that which no other court in the kingdom could do—destroy a right which exists by law." And yet in this action by the plaintiffs it is desired to take the goods out of the possession of the master, without satisfying the lien, as he has refused to accept the security offered. At page 104, Their Lordships further say—"neither in these cases nor in any other can we find any decision or dictum that when a clear legal right of lien is proved in the Court of Admiralty to exist, that Court can dispose of the property without regarding it, and thus, in effect, decide against it." Now the law as stated in one of the last text writers, *Lowndes on the Law of General Average*, 3rd edition, chapter XI, is laid down in conformity, I think, with the law as I have deduced it from these authorities. In speaking of the machinery which exists in this country for enforcing claims for general average he considers the remedies given at common law, and states that under ordinary circumstances the proper tribunal for determining claims of general average is a court of common law. He starts with the proposition that "The shipowner has at common law, a lien on the cargo while in his possession, or in that of his servants as a carrier, not only for freight, but also for the cargo's share of general average. This right of lien would entitle the shipowner to insist on payment of the general average by the consignees before delivery of their goods, were he at that point of time in a position to state the amount of his claim. This, however, is seldom or never the case, since the amount of contribution depends upon the value of the goods, which usually cannot be ascertained until they have been landed, and their condition examined. Practically, therefore, this right of lien can only be used as a means for enforcing the giving of satisfactory security or other equivalents for a payment before delivery." Satisfactory security! Satisfactory to whom? Why to the person using the lien as a means of enforcing the giving of it, in other words, in this case the master. The author continues—"The terms usually required as the conditions of delivery are, that the consignees shall either sign an agreement to pay their shares of the general average, according to the adjustment of a person named, or that they shall pay by way of deposit a sum sufficient to cover the amount of their liability when ascertained." Then the writer goes on to say—"Against the abuse of the power thus given to the shipowner, the English common law provides the following safeguards." What is the power the shipowner has got which he could abuse? The power of forcing the consignee to accept his nominee as adjuster, of forcing the consignee to consent to the insertion of a clause in the agreement that the right of general contribution had accrued, and any other admission he might choose to insist upon; a refusal to consider any security as satisfactory. These are abuses which the common law has provided against. The writer says—"In the first place, the consignee of goods can always obtain a right to the delivery of his goods, and consequently a right of action for damages, if they are not delivered, by tendering to the shipowner or captain a sum sufficient to meet his rightful demand. The duty of determining the amount to be tendered is thus practically cast upon the consignee; unless indeed the shipowner or master shall have made his demand for a deposit in such a manner as to imply a resolution on his part to take no smaller sum; which conduct on his part it seems, may

amount to the waiver of a tender, and excuse the consignee for not making it." Exactly, in different language, a definition of debtor and lienee or creditor that I started with. The law thus stands, and its being so found by me to exist, there remains the case decided by Mr. Justice Lush, in 1879—the case of *Crooks v. Allen, 5 Q.B.D., 38,* and if that case does not override that law, or place an interpretation upon the authorities different to that which I have placed upon them, the law still remains as it was before. The action was in the nature of negligence against the captain for not taking the proper steps to put the machinery in motion to ascertain the general average contribution. He also allowed the goods to pass out of his possession, and had not taken any security either by bond in the form suggested by Mr. Power or Mr. Griffith, or any other security. Mr. Justice Lush, having decided that he was guilty of this negligence, at page 41, goes on—"The next question is whether a shipowner is bound to exercise the power he is invested with when a general average loss has arisen, and to afford the means in his power for adjusting the average claims and liabilities and secure their payment to the parties entitled. It seems strange that such a point has not been formally decided in this country. It has been decided in America in favor of the shipper. I am not aware that it has ever been judicially questioned here, and I can only account for the absence of direct authority by supposing that the universal practice has been accepted as proof of the obligation. It is clear that the shipowner has a lien for general average on the whole of the cargo liable to contribution, and can require, before he parts with it, security for its due payment. In early times, the master, when he had jettisoned part of the cargo to save the whole adventure, took and rendered contribution in kind." In other words, took nothing but the actual compensation, and did not allow the goods to go until he had taken the money value of the goods. "The ordinary course now is, and has been for a very long time, for the shipowner to require before he delivers the cargo, an average bond or agreement for the payment of what shall be found due from each shipper for his proportion of the loss. He is the only person who has the power to require this security." What is the meaning of "the power to require this security"? It must mean that he is the only person who has power to define what the security shall be; the person having power to require must have the power to define. Then proceeding again, he takes up the other two matters of negligence in these words—"The right to detain for average contribution is derived from the Civil Law, which also imposes on the master of the ship the duty of having the contribution settled, and of collecting the amount, and the usage has always been substantially in accordance with this law, and has become part of the common law of the land." So that in these few lines you have the things he has to do contrasted in two groups. The one, the having the contribution settled and collecting the amount, the other, the obtaining the security before delivering the cargo. As to the one, he says, it has become part of the common law of the land; as to the other, he speaks of it as the ordinary course. Now, if both these groups had belonged to the common law, His Lordship would not have found it necessary to separate them and point out the distinction between them. In the next paragraph, he goes on—"I am of opinion, first, that the bill of lading does not exempt the shipowner from contribution to a general average loss, and secondly, that he is liable to this action for not having taken the necessary steps for procuring an adjustment of the general average and securing its payment. That is all which I am required to decide, and my judgment will therefore be entered for the plaintiff with costs." In that case I find nothing conflicting with the views of the authorities which I have extracted; on the contrary, I think that case strengthens it, and lays it down that the master is the only person who has the right to require the security, and, as I have said, the right to define the security. These are the authorities from the English tribunals which have been quoted before us, and which I have thought it desirable in a case of the present kind to review

at length. There has been quoted to us a case decided in the Supreme Court of Victoria, at Melbourne, a court for which, and for whose judgments, I may say, I have always entertained, and do entertain at the present moment, the highest respect. The report of the case produced before us is not in an authorised shape; it is cited as *M'Lean v. Liverpool Protection Assurance*, Melbourne, 27th June, 1883. *Australasian Insurance and Banking Record*, July 12th, 1883, page 271. It contains what purports to be a report of the judgment of the Supreme Court. The *Argus* newspaper has been produced for the statement of the case and the arguments only, and therein, Mr. Justice Williams is reported to have stated during the argument, that, as he understood the law, it was this, that the shipowner had a lien, and was entitled to demand cash before the goods were delivered, and if he could not state the amount within a reasonable time he was entitled to reasonable security; which is the exact definition of the law as I have found from the cases. He is entitled to reasonable security, not that he can be forced to take a reasonable security. In this newspaper account of the case are contained the arguments which do not seem to be recognised in the judgment, and the judgment does not agree with the dictum of Mr. Justice Williams already mentioned. If the point decided was the same as in this case, I am compelled, reluctantly and with regret, to differ from it, as I have to do. It remains for me only to say that the contention of the defendant has succeeded, and that judgment must be entered up for him.

Pring, J. Concurred.

Solicitors for plaintiffs: *Wilson & Wilson.*

Solicitors for defendant: *Hart, Mein & Flower.*

Sitting without a Jury.

February 16th, 1884.

Harding, A.C.J.

Greig v. South New Zealand Gold Mining Co. and others.

Companies Act of 1863—Forfeiture—Delay in prosecuting action—Equitable relief.

A continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by laches.

This was an action for the recovery of 600 shares in the defendant Company or damages for an alleged wrongful forfeiture thereof. The plaintiff was an original proprietor of 1500, but subsequently, of 600 only. On 17th September, 1880, plaintiff was a registered shareholder, before which time calls were paid irregularly. In September, 1879, plaintiff paid up all arrears. In 1880, plaintiff paid calls regularly till August, when a call of one penny per share was made. In August, plaintiff left the colony and went to New South Wales, and remained away till April, 1881. On the 17th August, a call was made, to be payable on the 6th September, which the plaintiff did not pay. On the 17th September, another call was made, due on 4th October. Notices were sent in respect of both calls. On 1st October, 1880, at a director's meeting, a resolution was passed forfeiting the shares and directing shares to be sold under Articles of Association 17 and 18. The shares were offered for sale and bought in by the Company, who credited plaintiff with £5, the amount of the two calls, on the 9th October. In April, 1881, plaintiff returned to Gympie and became aware of these facts. He consulted a solicitor, but owing to want of funds no proceedings were then taken. In September, 1882, the plaintiff, through a letter written by his solicitor, applied to be reinstated as a shareholder, and offered to pay all back calls. No answer was received, and on the 26th September, 1882, the writ in this action was issued.

The facts as to the forfeiture in this case and the case of *Bullen* v. *South New Zealand Co., Limited*, before the Chief Justice, reported *ante* 72, are identical. The Chief Justice on those facts held that a forfeiture had taken place.

Chubb, Q.C., (*Power* with him) for the plaintiff, contended that, as to the call due in August, Rule 17 of the Articles of Association gave 14 days from the 6th September to pay it, *i.e.*, to the 20th September, and a further period of 21 days before the sale by auction could take place, *i.e.*,

12th October, with the right of redemption up to one hour of the time of sale, whereas the shares were sold on the 9th October, and plaintiff's name was removed from the register. That the fact of making the call of the 17th September was a waiver of the forfeiture, if any, in respect of the August call. He referred to the case of *Bullen* v. *South New Zealand Gold Mining Co.*; *Q. L. Jl. Reports, 1882, p. 72. Wilmot* v. *Barber, 15 Ch.D. 96, 105.* He further contended that the delay was caused by the want of means of the plaintiff. As to damages he submitted that there was fraudulent conduct on the part of the directors in dealing with the shares, and the plaintiff was entitled to substantial damages.

Griffith, Q.C. (Sheridan with him) for the defendants, contended that there was a deliberate lying by on the part of the plaintiff for 28 months, and that he was barred from equitable relief. Further, that the plaintiff acquiesced in the forfeiture. As to the damages, plaintiff could only recover nominal, the shares being worth nothing at the time of the forfeiture, and of no value at the time of the trial.

Harding, A.C.J., referred to the following cases:—*Lehmann* v. *McArthur, L.R., 3 Ch. App., 496; Re Estates Investment Co., Ashley's Case, L.R. 9 Eq., 263; Heymann* v. *European Central Ry. Co., L.R., 7 Eq., 154; Deloraine* v. *Browne, 4 Brown's C.C., 628.*

HARDING, A.C.J.:—This is an action in which William Greig sues the South New Zealand Gold Mining Co. Limited, and certain other defendants, the present shareholders in that Company. The relief claimed is, what would before the recent alterations in the procedure have necessitated proceedings both in equity and law. In the present case they are stated in the alternative. Both proceed on the same breach by the defendant Company, namely, the wrongful alleged forfeiture of certain shares. The equitable relief sought is, a declaration that the forfeiture and subsequent sale of the forfeited shares should be declared void, and that either by transfers or otherwise the plaintiff should be reinstated as a shareholder, in short, the result of the equitable relief claimed is to replace the plaintiff in his position as a shareholder and to give him all the benefits which he would have derived had he continued a shareholder from the time of the alleged forfeiture. The relief which would have been obtained at law is damages for the wrongful act of forfeiture. The relief, so far as it depends upon the forfeiture, would have been supported by the same facts in both modes of procedure. In order that the plaintiff should succeed he must prove a forfeiture and that wrongful. I think the plaintiff has proved a forfeiture and that wrongful, consequently I think that the defendants have infringed the plaintiff's right thereby, and are liable to an action at law for damages. The same facts would entitle the plaintiff to equitable relief had he come into the court expeditiously, but this application for equitable relief is met by the defence of delay, which has always been held to be a defence to applications to this court in equity. The maxim being "*Vigilantibus non dormientibus æquitas subvenit.*" Lord Camden states in the case of *Smith v. Clay*, which will be found reported in a note to the case of *Deloraine v. Browne, 3 Brown's C.C., 638*, that "a court of equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court." In this case the defendants claim the benefit of that doctrine. The plaintiff says enough time has not elapsed. There are cases in which much less time than the time which has elapsed in this case has been held sufficient. In *In re Estates Investment Co., Ashley's Case, L.R. 9 Eq. 263*, sixteen months was held too long a delay by a shareholder seeking to be relieved from his shares on the ground of misrepresenta-

tion in the prospectus of the Company. In the case of *Heymann v. European Central Railway Co.*, *L.R. 7 Eq. 154*, three months after the discovery of the misrepresentation was held to bar the right to relief by a shareholder in respect of shares on the ground of misrepresentation. It has been urged that the plaintiff did not sue before by reason of want of means. Outside the matrimonial jurisdiction I am not aware that such an excuse has ever been allowed. If it were allowed every man however rich might say I had not the means to institute the suit, for it might be entirely for a man to consider whether he had or had not the means. It is further said that the Company knew of the plaintiff's claim, and that kept it alive. I do not think that is proved by the evidence, but were it proved the doctrine of the case of *Lehmann v. McArthur*, *L.R. 3 Ch. App. 496*, would cover it. It was there held that a continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by laches. That is also recognised in the older cases which are to be found collected in the second volume of *Lindley*, page 902 and following pages. It remains therefore for me on the facts to decide whether or not the plaintiff is barred by his conduct and delay in respect of the equitable relief sought. The wrongful act of forfeiting the plaintiff's shares which on the forfeiture were registered in the name of the Company was complete on the 1st October, 1880, on which day at a directors' meeting a resolution was passed forfeiting the shares. At this time the plaintiff was absent from the colony in New South Wales, he had left in August of that year. His calls at that time were paid and he was a director of the Company, and had on the 24th July, 1880, that is to say, a fortnight or three weeks preceding, been present at a directors' meeting held on that day, on which day at the meeting at which he was present a resolution was passed that "all owing more than one call be noticed that if the calls with interest be not paid at once their shares will be forfeited and they will be summoned." Showing to my mind that at that time the Company were assuming activity with regard to the calls and the forfeiting of shares. The plaintiff did not when he left inform the Company that he was leaving, nor did he resign his directorship, but he casually in the street, at a spot where mining business was constantly transacted in Gympie, informed Mr. Ferguson, at that time the chairman of the directors of the Company, "that in the sinking of the shaft he had seen nothing to justify him in going on with the claim. He said he afterwards drove 44 feet and he saw the two leaders were very poor, and the Company was very poor, and he thought that he would throw up or dispose of his interest." After that time till he left he never saw the chairman He also saw very shortly before he left one Stephen Owens, to whom he said that "he had very little hopes of the mine turning out anything. He sunk 110 feet and drove 45 feet at 24/6 a foot. They'd cut two leaders with nothing in them, no gold in them. He put in for the next contract after that, he did not get it and he discontinued." He told Owens he had a notion of going to New South Wales and abandoning it. Owens says both the plaintiff and his brother asked him to go with them. That, so far as he stated by word of mouth, was his expressed intention, which amounts, to my mind, at that time at all events, to stating that he did not care what became of his interest in the Company. At this time the shares were absolutely valueless, they fetched nothing, and in the December following they were of so little value that one thousand were sold at one shilling each. Now the plaintiff at this time had left the colony with borrowed money, and left for the maintenance of his wife encumbered property and borrowed money. So far as I can interpret the evidence, I interpret it that he was a man at that time throwing up all he had in Gympie and going forth to seek a new outlet and commence *de novo*. He remained in New South Wales till April, 1881. During this time the property improves in value, the shares become saleable, and dividends are either paid then or shortly after his return, and such a state of things continues for some time after his return. It is proved that the shares, during the time between his leaving and

the time of his commencing the action in September, 1882, rose as high as 85/- or 40/- each, and dividends were paid, consequently between these times a great stake arose to sue for, and if he succeeds in the equitable relief he would gain the whole of that stake. He returned to Gympie in 1881, he communicates with his solicitor, and although the advice he was given is not before us, yet we know it induced him to endeavour to obtain money to commence proceedings, and that he had an object in getting that money. Notwithstanding he had made up his mind at that time to commence proceedings he did not do what in good conscience and good faith he ought to have done, tell the Company he was only waiting to attack them until he got the money, but he kept that to himself and lay by, and never in any way communicated with the Company until a few days before his writ was issued, namely, 14th September, 1882, when he made a claim through a letter written to the Company by his solicitor, Mr. Power, to which no answer was received, and the writ was issued twelve days afterwards. It has been said and proved, that when he left Gympie his shares were under a charge to a Mr. Bruin, and that during his absence, but after the forfeiture and dealing with the shares by distribution amongst the shareholders of the Company, Bruin on his own behalf made an informal tender of all back calls. The plaintiff says that he is entitled to be allowed as though Bruin had done that as his agent. This was about the end of December, 1880. If that amounts to an act done by Bruin of which the plaintiff is to have the benefit it amounts to a claim made in 1880 but in no way substantiated until the writ was issued in September, 1882, which prolongs the delay in taking proceedings, that is to say, from December, 1880, to September, 1882, is twenty-one months delay if Bruin is to be accounted the plaintiff's agent, if not, the delay commences from April, because it was in April, 1881, that the plaintiff himself says that he knew of the wrong which had been done to him, which would give eighteen months, shortening the delay by three months. That is how the case stands. Taking the worst view against the plaintiff a delay of twenty-one months, and taking the most favourable view a delay of eighteen months. During which time the shares became very valuable, and a great prize arose to be litigated for. This court does not allow a man to lie by so that after an event has happened he may sue or not sue as he thinks fit. Probably if these shares from the time he left until the issue of the writ had not improved in value this action would not have been brought. At the time he left the shares were worth nothing, and if a prize had not arisen in the meantime I think we should have heard nothing of this suit. I think the plaintiff has absolutely failed in his application for equitable relief, as I say, at law, he has a right to damages for the wrong done him. Taking it at either end the shares are on the evidence shown to be worth nothing, therefore his damages are nominal, namely, one shilling. My formal judgment consequently is: let the action, so far as it seeks equitable relief, stands dismissed; judgment for the plaintiff for the nominal damage of 1s.; and let the plaintiff pay the costs of the action.

Solicitor for plaintiff, *Chambers*, agent for *Power*, Gympie.

Solicitor for defendants, *Wilson & Wilson*, agents for *Tozer*, Gympie.

Harding, A.C.J. 4th March, 1884.

POWER V. MCBRIDE.

Distress Replevin and Ejectment Act of 1867—(31 Vict. No. 16) ss. 6, 7, 8, & 11—Statute of Limitations.

Power appeared for the plaintiff, *Real* and *Prior* for the defendant.

The facts sufficiently appear from the judgment.

Harding, A.C.J.:—The action is one brought by John Joseph Power against William Martin McBride, claiming partition of a certain piece of land situated in Boundary street, South Brisbane, also on account of rents said to have been received by the defendant in respect of that land or some part thereof. The plaintiff lays his title

to the land sought to be partitioned, as follows: He alleges that the piece of land was granted by the Crown in 1845 to one Cross, who, in 1846, conveyed it to James Graham and Bernard McCann as joint tenants, and that, in 1847, the joint tenancy was severed by James Graham conveying his undivided share to Michael Power, who died in the year 1859, and left the present plaintiff his heir-at-law, and that the legal estate in the property has since that time by divers assignments in the law passed out of and repassed to the plaintiff, and that as shown by the documentary evidence the title should now be in the heir, the plaintiff. Assuming these events show a good documentary title to the plaintiff to an undivided share in the land, the plaintiff is met by the defendant's defence, which is, assuming a good documentary title to the plaintiff, yet he is barred by the Statute of Limitations and has no right to the land. He relies upon the sixth, seventh, eight, and eleventh sections of the *Distress, Replevin and Ejectment Act*, the first of which, the sixth, enacts as follows, that "No person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims or if such right shall not have accrued to any person through whom he claims then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same." Then the part of the eleventh section which applies to this case as to when the right of entry first accrued is that opposite the marginal note "on alienation" which reads as follows:—"And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted appointed or otherwise assured by any instrument (other than a will) to him or some person through whom he claims by a person being in respect of the same estate or interest in the possession or receipts of the profits of the land or in the receipt of the rent and no person entitled under such instrument shall have been in such possession or receipt then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid or the person through whom he claims became entitled to such possession or receipt by virtue of such instrument." So that the right of the plaintiff or those through whom he claims first accrued on the execution of the conveyance from James Graham to Michael Power in 1847. It has been shown on the evidence that from that time to the present neither Michael Power, the plaintiff, nor the person through whom he claims, have been in possession, consequently, during the whole time since their right of entry accrued they have been out of possession, and the right of entry accrued, to my mind, on the execution of the deed in 1847. On one occasion it appears the present plaintiff visited the land and made certain claims and statements with respect to it, but was driven off the land by the present defendant after the production of a revolver, so that the possession so far as it has been attacked by the present plaintiff has also been insisted upon and the plaintiff's rights denied by the defendant. The maxim *Vigilantibus non dormientibus leges subveniunt* applies to the plaintiff's case. He has not been vigilant, he and those through whom he claims have laid quiet since 1847, thirty-six years. On the other hand it has been said that the defendant's evidence is not so consistent that it should be received. The answer to that is, if the plaintiff had been more vigilant circumstances would not have so fallen out as to have left the matter so long to the defendant's memory. Now as to the defendant, he says, the plaintiff has been out of possession, I or someone else have been in possession for twenty years, consequently the plaintiff is not the person to claim a partition from me. Defendant says his right to this property stands thus, when that conveyance severing the joint tenancy was made by James Graham to Michael Power, McCann resided on the land; that notwithstanding that McCann still continued to reside upon the land; that at some time about this time James Graham was married to Sarah,

the daughter of McCann, and that McCann still continued to live upon the land and Graham and his wife resided there also; that he had possession not only of his half but of the whole of the land; that James Graham died in 1849, leaving M'Cann still alive. McCann died in 1853, leaving Sarah Graham alive and a son of hers by James Graham (James Edward Graham). These people died without wills. That after Sarah Graham died, her mother, the wife of McCann, continued to reside upon the property and resided there till the present defendant came into residence thereon, Mrs. McCann having during that time married a man called Williams. In January, 1861, the defendant came into possession clearly with the consent of Mrs. Williams. Mrs. Williams was then the only person related to the young James Edward Graham left, and if the possession descended through his mother, Sarah Graham, Mrs. Williams continued that possession on behalf of the child as heir, and when she gave it up to the present defendant she gave it up on behalf of the heir. There is nothing to show that her possession was adverse to the interests of the heir, it was the possession one would naturally expect to find, a child brought up by a grandmother using the property for the maintenance of the child. Then, in 1861, the defendant was let in possession by the grandmother and immediately after, within three or four months, she recognises the title of her grandson and a new lease of the premises is entered into for five years for the price of £75, which is paid and the old document is torn up, and this was entered upon recognising the child as the owner in possession. This goes on till the child requires money, when the defendant says he bought the possession for ever from the child and gave £300 and upwards therefor. Either the property passed from the child to the defendant and he is the rightful owner of it, or it did not, but he from that time occupied it with the consent of the child, and I think the child having come of age and sanctioned it, he must be taken to have occupied it as his agent or owner, but if he did not it still remains in the child, not in the plaintiff. However it works out, the plaintiff is not shown to be the man to sue the defendant for a partition. Either the defendant has been in possession over twenty years or the heir has been, and that being the case, I think, putting aside the bye questions which have been raised in the case, the plaintiff cannot succeed.

Action dismissed with costs.

Solicitors for plaintiff, *Bunton & Little.*

Solicitor for defendant, *Norris.*

ROMA CIRCUIT COURT.

Harding, A.C.J. 12th February, 1884.

REGINA *v.* PARKER

Delivery of Gaol.

Parker's name appeared on the gaol calendar as standing committed for trial for attempted suicide. *Power*, prosecuting for the Attorney-General, stated that his name was on the calendar by mistake, that he had been committed to the District Court. His Honor directed the warrant of committal to be produced. The gaoler produced it, stating there was no mistake, the warrant committed the prisoner to Roma goal till he was delivered in due course of law. It was endorsed in the margin in different ink from the body " for trial at the sittings of the next Southern District Court at Roma 1884. James Raften, A.C.P.S." James Raften, whose name appeared in the body of the warrant, is a constable. There was no other warrant against him, Mr. Power presented no information, and His Honor discharged the prisoner.

THE QUEENSLAND LAW REPORTS.

CASES DECIDED IN THE

SUPREME COURT OF QUEENSLAND,

DURING THE YEAR 1879—42 AND 43 VICTORIA.

EDITED BY H. R. BEOR, Q.C., FOR THE QUEENSLAND LAW SOCIETY;
THE JUDGMENTS REPORTED BY W. H. OSBORNE.

Jan. 16th, 1879.

RE MARGARET HUDSON.

Committee of Lunatic—Insolvency of Committee—Improper dealing with property of Lunatic.

The committee of a lunatic is liable to be discharged from his office (1) if he becomes insolvent, or (2) if, in making an application to the Court concerning the estate of the lunatic, he omit to disclose a material fact, or (3) if, in any dealing with the estate of the lunatic for which the authority of the Court is necessary, he act without such authority.

LUTWYCHE, A.C.J.:—An order *nisi* was granted on the 14th December last, ordering that Alexander Brown Pritchard, as committee of the estate of Margaret Hudson, be restrained from dealing with certain property in Warwick until January 3rd, 1879, and calling upon him to show cause why he should not be removed from the office of committee of the estate of the above-named lunatic.. In moving the order absolute, the principal ground urged was that Pritchard was an uncertificated insolvent, a fact which it was alleged, and alleged correctly, was not brought before the court when he was appointed committee of the lunatic's estate. Some stress was also laid on the action of the committee in having advertised for sale by auction a piece of land containing ten acres, being allotments 1 and 2 of section No. 36, in the town of Warwick, part of the estate of the lunatic, without the authority of the court. It will be convenient to deal with this point first. On the twelfth of November last the committee of the estate, on his own personal application, supported by an affidavit, made by himself, and as I collect from the papers drawn up without professional assistance, obtained an order from the court to complete and carry out a contract of sale of the two allotments already mentioned to one John S. Crate, for the sum of £100; the grounds for the application being that he was desirous of carrying out such sale for the purpose of raising funds for liquidating the claims of certain creditors of the lunatic, and to provide for incidental expenses incurred in connection with his office of committee. In this affidavit nothing was said about the quantity of the lunatic's estate in the land, and as the contract was stated in Pritchard's affidavit to have been made with Crate for the absolute sale of the land the inference drawn by the court was that the committee was in a position to dispose of an estate in fee-simple if the court should so direct. But it appears upon an examination of a deed of conveyance executed on the 4th of July, 1864, and made between Frederick Hudson of the first part, Margaret Hudson, wife of Frederick Hudson, of the second part, and Benjamin Glennie and Samuel William Aldred of the third part, that the land in question had been conveyed by Frederick Hudson to Glennie and Aldred for the separate

use of his wife during her life subject to her powers of appointment provided for by the deed, and in default of appointment, to the use of Margaret Hudson her heirs and assigns for ever. Margaret Hudson therefore at the most took only a life estate in the land. It appears from an affidavit of Frederick Hudson, sworn on the 14th day of December last, that there is issue of the marriage of Frederick and Margaret Hudson, who is of age, and a married woman, by name Annie Freeman Rodger, who is the heiress at law of the lunatic, and would therefore be entitled to the fee-simple of the land in remainder in default of any appointment by the lunatic, who, on the affidavit of a competent medical authority is declared to be hopelessly and incurably insane. Mr. Pritchard, in the sixteenth paragraph of his affidavit, sworn on the 2nd instant, denies that he was aware of the existence of such a person as Annie Freeman Rodger till the month of November last, but does not state the particular day in November on which he arrived at a knowledge of that fact; but giving him the benefit of a doubt on that point, he either knew or ought to have known as a substituted trustee under the deed of 1864 that Mrs. Hudson took only a life interest in the land. If he knew, he acted most improperly in making an application to the court to authorise the completion of a contract of sale of the fee-simple; and, if he did not know, he has shown a lamentable example of unfitness for the office of a trustee, which in itself would not simply justify but demand of the court his removal from the office of committee of the estate. His subsequent action in advertising for sale by auction, without having previously obtained the authority of the court for that purpose, would at first sight appear to be totally inexcusable, and would be a sufficient ground for his removal from the office of committee. But he alleges in his affidavit of the 20th December last that the contract of sale with Crate had fallen through, and that he was therefore desirous of selling the land to any other purchased, either by public auction or by private contract. It was his duty, however, to have obtained an order from the court before he ventured on taking such a step as advertising the land for sale to any other person than Crate, and, although his counsel urged that this was merely an error of judgment, it was by itself so grave an error as to raise a serious doubt whether he was a fit person to continue to hold the office of committee. Setting apart, however, that consideration, I think that by omitting to inform the court in his affidavit of the 12th November that Mrs. Hudson had only a life interest in the land, he *ipsé facto* disqualified himself from acting as an officer of the court, so to speak, any longer. Although after what I have already said it is not necessary to express any opinion on the propriety of the removal of Pritchard from his office of committee, on the ground of his being an uncertificated insolvent, yet as I have formed a very strong opinion on the subject, I think it advisable in the interests of the suitors of the court to state what my views are on that point. I have been referred to authorities in *Shelford on Lunacy, chap.* 5, *sec.* 8, and to the cases of *ex parte Proctor re Birch*, 1 *Swanst. p.* 531, and *ex parte Mildmay*, 3 *Vesey, jun. p.* 2, and I think it quite clear that the insolvency of the committee of the estate of a lunatic is a sufficient ground for removal. It appears from the affidavit of L. F. Bernays, that on the 7th July, 1875, A. B. Pritchard, then an uncertificated insolvent, applied to His Honor the Chief Justice for a certificate of discharge under sub-sec. 1 of sec. 167 of the Insolvency Act of 1874, and that the application was refused, and has never been renewed, and that Pritchard is still an uncertificated insolvent. Mr. Pritchard, in his affidavit sworn on the 2nd instant, has sworn that his present aggregate income amounts to not less than £300 per annum, and if he spends it as fast as he gets it he may be free from any importunities of his creditors under the insolvency; but as any balance remaining unpaid in respect of any debt proved in the insolvency would now be deemed to be a subsisting debt in the nature of a judgment debt (see sec. 176, sub-sec. 2, of the Insolvency Act of 1874) his

creditors might enforce their claims against any accumulated property, and the bond given to the court for the due performance of his duties would be of little if any value. On a former occasion when giving judgment on the dismissal of a motion in this case (August 14, 1878) I observed "that I should certainly desire to follow, as a general rule, the practice which obtains in England, when circumstances will permit," and I think reference may be made with advantage to the practice now followed in England with regard to bankrupt sureties by the 18th general order of 1853, A 1, No. 206. If a surety die or become bankrupt or insolvent, a new surety is required, and the master, on a summons taken out for that purpose, and having proof of the death, &c., of the surety, fixes the time within which the committee shall enter into fresh security. If then insolvency disqualifies a surety of the committee, *a fortiori* it should disqualify the committee himself. The order I make is that Alexander Brown Pritchard be discharged from the office of committee of the person and estate of Margaret Hudson, and from acting in any manner in the affairs of the lunatic, and that Pritchard do pass his accounts before the master, the trustee under his insolvency to be at liberty to attend, the balance to be found due to be paid into court, upon which his recognizance shall be vacated; and in default of such payment let it be referred to the master to enquire and certify whether any proceedings should be taken for obtaining payment from Pritchard or his surety of such balance. I make no order at present for an inquiry as to the most proper persons to be appointed committees of the person and estate of the lunatic in the place of Pritchard. The unfortunate woman is now in Woogaroo, where I have no doubt she will receive the care and attention which her unhappy position demands. From the very painful nature of the evidence which has been brought under my notice during the various stages of the proceedings in this case, I have no reason to believe that she will be better cared for anywhere else than where she is at present. Her small property has already been seriously diminished by the costs which have been incurred in the conduct of the case, but if at any time hereafter there should be sufficient funds to provide her with an annual allowance which would materially add to her comfort, I shall be only too glad to hear any application for that purpose. As the court has already ordered that no further dealings should be had with the land in question until the further order of the court, that part of the lunatic's property is sufficiently protected. The costs of the present application must be paid by the committee.

Feb. 6th, 1879.

THE NORMANBY COPPER MINING CO., *v.* CORFIELD AND OTHERS.

Mining Company—Ultra vires—Loan—Overdrawn Banking account—Preference.

The Normanby Mining Company being indebted to their bank in the sum of £4,000 upon the security of a mortgage of their real property, were at different times allowed advances by the bank by way of overdraft for the purpose of paying the wages of workmen, and the cost of materials for carrying on the mining operations. In December, 1873, the overdraft had reached the sum of £3,500, and the affairs of the Company being then in an embarrassed state, and they being pressed by the bank for payment of the £7,500 then due, requested Corfield to advance them the amount. Corfield agreed to make the advance upon having its repayment secured by a mortgage over the real estate of the Company for £3,500, and by three promissory notes for £4,000, £2,000, and £1,500 respectively signed by directors of the Company. In February, 1874, the Company being then insolvent, and unable to pay its creditors, Corfield sold the real estate which had been mortgaged to him, and received the whole of the debt of £7,500 with interest due to him by the Company out of the proceeds.

Held, that the Company's unsecured debt of £3,500 to the bank, was the balance of an account overdrawn for the purposes of the business of the Company, and therefore was not a loan in excess of the borrowing powers of the Company.

That the transactions with Corfield being in effect a mere substitution of Corfield for the bank as the creditor of the Company, it was not a loan in excess of the powers of the Company; nor did the payment to Corfield of the £4,000 not secured by his mortgage constitute a fraudulent preference.

The Normanby Copper Mining Company Limited, was a joint stock company registered in

Brisbane, on the 18th of April 1872, under the provisions of the Companies Act 1863, and carried on business under its memorandum and Articles of Association. It was provided by the seventy-third clause of the Articles of Association that the directors of the Company might borrow upon mortgage of the real estate of the Company to the amount of £4,000., A short time before the 12th of December 1873, the defendants, other than Corfield, including the directors of the Company, being personally liable to the Bank of New South Wales for the sum of £7,500, upon the suggestion of the manager of the Maryborough branch of the Commercial Banking Company of Sydney, requested Corfield to advance the Company the same amount in order to enable them to pay off the Bank of New South Wales. Corfield agreed to make the advance upon having as security for its repayment, a mortgage of the real estate of the Company, and promissory notes signed by the other defendants for £4,000, £2,000, and £1,500. On the 12th December 1873, Corfield advanced the £7,500 to the Company, with which the debt of the Company to the Bank of New South Wales was discharged. In order to make the advance, Corfield obtained the money by way of an overdraft from the Commercial Banking Company who advanced it to him at the request of the other defendants upon the terms that the Normanby Company should pay bank interest for the part of the money not secured by mortgage and should pay Corfield one and a half per cent. on the whole sum of £7,500 by way of commission for procuring the money, that the mortgage and promissory notes should be deposited in the bank as security for the overdraft, and that in consideration that Corfield would realise upon the mortgage security with the consent of, or when requested by the bank, and would permit the bank to receive all sums of money to which he might become entitled under the mortgage and in respect of the promissory notes, except £112 for his commission, the bank would hold him discharged from all liability in respect of the overdraft. Corfield received the agreed mortgage from the Company and deposited it with the bank, and the makers of the promissory notes handed them to the manager of its Branch. The mortgage comprised the whole of the assets of the Normanby Company, except chattels of nominal value. The money lent by Corfield and interest remained unpaid up to February 1874, when Corfield sold the land comprised in the mortgage for £10,500, under power of sale contained in the mortgage. The proceeds he applied in discharge of the mortgage debt, and a portion of the residue after payment of the mortgage debt to the amount of £4,164 in payment of what remained due upon the promissory notes, and the balance was paid to the credit of the company. At the time of the sale the Company was insolvent, and continued so up to the 8th of May 1875, when it was ordered to be wound up by an order of the Supreme Court, and an Official Liquidator was appointed. The Official Liquidator disallowed the payment of the £4,164 and commenced a suit to compel Corfield to repay it to the Company. He also claimed accounts and a declaration of the rights of the parties.

The Attorney-General (S. W. Griffith, Q.C.) and *Harding* for the Plaintiffs; *Pring, Q.C.* and *Real* for Corfield and other Defendants.

LILLEY, J.:—The Normanby Copper Mining Company began business in the year 1872 for the purpose of mining upon a selection of land which became the property of the Company. They were further empowered by their Memorandum of Association to purchase any metallic ores or metals, and also to sell, export, or otherwise dispose of all or any of such ores and minerals. The bankers of the Company were the Bank of New South Wales, to whom, under the authority in their Articles of Association, they mortgaged the mine for a sum of £4,000. They afterwards became indebted to the bank in a sum of £3,500, their total indebtedness being at last £7,500. In August 1873, if not before, the Company became embarrassed in their finances, and so continued until the 17th of February, 1874, when all their moveable property and realty had been sold—the

first under executions at the suit of their workmen, and the real estate under the power of sale in a mortgage in favor of the defendant Corfield. There can be no doubt that at the time, after a distribution had been made of the funds received from the sale of the realty, which were all the assets of the Company, certain debts remained unpaid, and that the Company was insolvent. For some months the Company had been struggling, and unable to pay 20s. in the pound upon their debts as they became due and payable. I consider it unnecessary to recapitulate in minute detail the various resolutions passed at the meetings of the directors, or the history of their attempts to dispose of preferential shares, or their other expedients to obtain money to carry on the Company. It is enough for me to say that at the time of the transactions, which this suit is brought to impeach as fraudulent preferences, or as acts beyond the power of the directors, the Company was insolvent. On the 17th of February 1874, and for some time previous, the directors and shareholders were aware that unless their liabilities could be met by the disposal of new shares, or other means, the Company must necessarily be wound up. It seems to me that on that day, when they had distributed all their remaining assets but had not satisfied their whole indebtedness, they contemplated winding up, equivalent to a contemplation of bankruptcy under English law; they must, I think, have foreseen that to be inevitable, when they had satisfied their own liabilities in full and left creditors unpaid. In the distribution of their assets on that day they paid the defendant Corfield a sum of £3,500 due to him on the mortgage of the mine, and a further sum of £4,000, with costs of sale, interest, &c. The plaintiff admits the validity of the payment of the £3,500, with interest, costs, &c., included in defendant Corfield's mortgage, but claims from him and the other defendants a portion of the balance of the purchase-money of £10,500 for which the mine was sold. The plaintiff alleges that beyond the £3,500 mortgage money, Corfield's claim was for money borrowed in excess of the directors' powers under the articles. It is important therefore to trace the origin and determine the nature of Corfield's debt. It arose thus: the Company being indebted to the Bank of New South Wales in the beforementioned sum of £7,500, secured as I have stated, the banker demanded payment of that sum. After some negotiations, the directors being unable to meet that demand out of the funds of the Company, the defendant Corfield agreed, at the request of the directors, to obtain the money by means of an overdraft allowed to him by the Commercial Bank to pay off the debt to the Bank of New South Wales. He received as security a mortgage over the real estate of the Company for £3,500, and three promissory notes for £4,000, £2,000, and £1,500 respectively, in all for £7,500. These notes were all signed by defendant Palmer, and the second and third by defendant Southerden. It has been contended that the indebtedness of the Company to the Bank of New Souh Wales beyond the sum of £4,000, their mortgage debt, was in excess of the borrowing powers of the directors, and was improperly paid. It seems to me that the debt arose as the result of the business drawings and deposits of the Company in the ordinary course of their business with their bankers. The bank pass book of the Company has not been put in evidence, but I think there can be no doubt from the resolutions in the minute book, that there was no loan of any specific sum of money, but that the indebtedness was the balance of a banking account current by way of overdraft up to a limited amount. The whole of the money was applied in payment of wages, and for materials, and the ordinary business expenditure of the Company. The *Cefn Cilcen Mining Company, L.R. 7 Eq., 88*, and *Waterlow v. Sharp*, and *Gardner v. Sharp, L.R. 8 Eq., 501*, are authorities to show that such an overdraft is not a borrowing within the meaning of the articles of association. In the *Cefn Cilcen Mining Company* it is treated as well established law, both in the argument of counsel, and in the judgment of the Vice-Chancellor, that "the

balance due to a bank by a company which keeps an account with it and has had the benefit of the money, is a debt, but not a loan in the proper sense." The case of *Waterlow v. Sharp* followed the *Cefn Cilcen Mining Company*, and against neither of them does there appear to have been any appeal. It seems to me impossible to make any real distinction between those cases and this of the Normanby Company, or their relation to the Bank of New South Wales. There was not in either of the English cases a mere competition between a creditor and shareholders who were seeking to take the funds discharged from the equitable debts or obligations of the Company, but in both cases, so far as I can see, and certainly in the *Cefn Cilcen* case, creditors were seeking to prove in competition with other creditors and succeeded. I think, therefore, that the debt to the Bank of New South Wales was a debt which could have been recovered against the Company. It has been however submitted that, assuming my conclusion on this point to be correct, still Corfield stands in respect of his claim in a different position to the Bank of New South Wales; it is said that beyond £3,500 which was due under the mortgage of the realty to him within the borrowing power, the money with which in addition to the £3,500 he discharged the debt of the Company to the Bank of New South Wales was, in fact, a loan by him to the Company, and that the Company having exceeded its borrowing power the excess was not recoverable, and there was no title to receive it or right to pay it to him. Corfield, with the full knowledge of the Company, obtained the money from the Commercial Bank expressly to pay off the debt to the Bank of New South Wales, to relieve the Company from the pressure which the Bank had put upon it for payment, and to give them time to dispose of shares or to form a new Company, or otherwise to meet their liabilities. They appear to have been anxious then to preserve and carry on the mine. The Bank of New South Wales was requested to transfer the mortgage to Corfield; the intention was plain, that the debt should remain the same with the same security for the loan, with the same sureties, and that the only substantial difference should be a substitution of Corfield as a creditor for the Bank of New South Wales. I think there was no new borrowing in the sense intended in the articles of association; technically, no doubt, Corfield, when he overdrew, borrowed the money from the Commercial Bank, and he paid for the Company the debt to the Bank of New South Wales, but he did not borrow for the Company, and I think it was in substance a mere transfer or assignment of the debt of the Bank of New South Wales to him; he became the substituted creditor—the Company never had the disposal of any portion of the £7,500 which he advanced to satisfy the demand of the Bank. I think, therefore, neither the transaction with the Bank of New South Wales nor the subsequent one with Corfield, was in excess of the powers of the directors. Corfield's debt was at least a good equitable debt at the time he received the money, on the 17th February, 1874. That money was paid to him after the sale by Robertson, the agent of the purchasers. Looking at all the facts, I think that payment was made, under pressure, by Corfield, and that the transaction was not impeachable either as being beyond the powers of the directors or as a fraudulent preference. I think there is no evidence to justify me in holding that the defendant Corfield was a party to any scheme or contrivance for assisting the directors to prefer themselves to the creditors, or to obtain a preference for himself. Corfield did not receive any part of the £10,500, beyond the moneys due to him. The balance of the purchase money was paid to the account of the Normanby Copper Mining Company with the Commercial Bank, and was paid away by the directors on the 17th February, 1874. There must be judgment for the defendant Corfield, with his costs of suit, and also the costs of the demurrer which is decided in his favor by the effect of my judgment. And now, as to the defendanst Southerden and Palmer:—On the 17th February, 1874, beyond the amount paid to Corfield, there was a balance of the £10,500 amounting to £2,674, which was disposed of by paying the debts mentioned in the minutes of the

17th February, 1874, (No. 61). In respect of these payments, the plaintiff makes no complaint against Palmer and Southerden that they were fraudulent preferences or misappropriations. The complaint against them is that after payment of the £3,500 they retired the promissory notes which they had given Corfield as security for his debt of £7,500. Relatively to Corfield in respect of these pro-notes, the other defendants were merely sureties for the Company, and the principal debt being a valid one and having been paid under pressure, and not by way of fraudulent preference to the creditor, no liability arose against the defendants Southerden and Palmer. They were never creditors, and never preferred to others. The pro-notes were never a personal debt of the directors. I must regard the very substance of the matter. The primary object of the assistance the directors obtained from Corfield was part of a last effort to preserve the property and carry on the mine. When the crash came they probably were anxious to avoid their suretyship being enforced against them, and they might be not unwilling to protect Corfield, who had been drawn in innocently to render them temporary assistance in their last struggle. Nay, they might even wish to prefer him to other creditors, but I think there was no scheme or contrivance between Corfield and them; he pressed them on the urgency of the Commercial Bank, and sold to protect himself. There was therefore no fraudulent preference. There will be judgment for the defendants Palmer and Southerden, but without costs.

Solicitors for the Plaintiffs, *Hart & Flower.*

Solicitor for Corfield, *T. Bunton.*

Solicitor for other Defendants, *P. Macpherson.*

March 18th, 1879.

RE THE REAL PROPERTY ACT, 1861, AND THE APPLICATION OF THE RIGHT REVEREND DR. O'QUINN.

Public Road—Dedication—25 Vict. No. 14.

The owner of certain land having subdivided it for the purpose of selling it in allotments, deposited with the Registrar-General a map, showing the subdivisions and streets as required by sec. 119, of the Real Property Act of 1861. The map showed a street running through the land called Gotha-street. Subsequently to the deposit of the map, the land having been assessed for rating purposes in one block, the owner procured its assessment in the subdivisions shown on the map, and from that time he paid no asse sment on Gotha-street. The land, soon after its subdivision, was advertised for sale by auction, and described as having been subdivided into 20 allotments, Gotha-street intersecting them. To the majority of the allotments there would have been no access but through Gotha-street.

Held, that there was sufficient evidence of the dedication of Gotha-street as a public road or highway.

Griffith, Q.C., (Harding, with him) moved absolute a rule calling upon the Registrar-General to show cause why a writ of *mandamus* should not issue commanding him to register, under the provisions of the Real Property Act of 1861, the transfer of certain real estate situate in Fortitude Valley from James Gibbon to Bishop O'Quinn.

Pring, Q.C., showed cause.

The facts sufficiently appear in the judgment.

LUTWYCHE, A.C.J.:—An order *nisi* was granted on the 22nd of January last, calling upon Henry Jordan, Esq., the Registrar-General of the colony, to show cause why a writ of *mandamus* should not issue, commanding him to register, under the provisions of the Real Property Act of 1861 the transfer of a portion of land containing 2 acres 1 rood and $8\frac{6}{10}$ perches, fronting Wickham and Ann-streets, Fortitude Valley, from one James Gibbon to the applicant, and which said transfer was lodged in the Real Property Office for registration on the 21st May, 1875. The portion of land in question is a part of eastern suburban allotment No. 67, and is situated within the boundaries of the Municipality of Brisbane. At the time the transfer was lodged at the Real Property Office, a map was deposited as required by the 119th section of the Act of 1861, showing that it was subdivided into twenty separate allotments, and showing a street named Gotha-street, intersecting the centre of the subdivisions, and running in a straight line from Ann street to Wickham-street. In the year 1873 this portion of land, part of portion numbered 67, was assessed by Mr. J. H. Adams, then acting as assessor for the city of Brisbane, as a whole, but in the course of that year Mr. Adams was requested by Mr. Gibbon to assess it in subdivisions, and he was

furnished for that purpose with a copy of the plan of the subdivisions, corresponding in every respect with the map deposited in the Real Property Office on the 21st May, 1875. Mr. Adams accordingly assessed the subdivisions separately for the year 1874 and following years, including 1878, and the assessment was duly paid on these subdivisions. In no assessment or valuation made since 1873 was the value of Gotha-street included, and no assessment was paid in respect thereof. On the 19th May, 1874, there appeared in the *Telegraph* newspaper an advertisement for the sale by public auction of the subdivisions shown on the plan, and the advertisement described Gotha-street as intersecting them. In June following, the land was submitted for sale by auction in two lots, and both lots were knocked down by the auctioneer, though there is no evidence to show that at this time the property really changed hands. At some time, however, in the course of that year the property was sold to Dr. Quinn, and a transfer of the land as a whole (except subdivision No. 1) was executed by Mr. Gibbon, but the Registrar-General declines to register the transfer and issue a certificate of title thereunder, on the ground that a public road or highway through the land has been dedicated to the public, though he expresses his willingness to register the transfer, provided it be limited to that portion of the land, and shows that street intersecting the property which is not included in Gotha-street. We are of opinion that the objection taken by the Registrar-General to the application made to him is well founded. The 119th section of the Act of 1861 requires any proprietor subdividing any land under the provisions of the Act for the purposes of selling the same in allotments to deposit with the Registrar-General a map distinctly delineating all roads, streets, &c., set apart for public use, and also all allotments into which the land may be divided. The section refers to the subdividing for the purpose of selling the same in allotments as a township, but we think that it ought to be read as if the words "or part of a township" followed on the words "as a township." It never could have been the intention of the legislature to confine the salutary operations of the provisions of this part of the Act to cases in which the proprietor of a large quantity of land lays it out for the first time as a township, and, indeed, any such interpretation is entirely inconsistent with the proviso at the end of the 120th section authorising subsequent subdivisions of the same land, on the condition of depositing a map showing the further subdivisions. It appears to us that, in the absence of any evidence to the contrary, such for instance as a proclamation directing the street to be closed, it was the duty of the Registrar-General to preserve for the public the right of way through Gotha-street, of which the map afforded strong *primâ facie* evidence of dedication. We are further of opinion, that, independently of the map deposited in the Real Property Office, there is sufficient evidence disclosed in the affidavits to show that Mr. Gibbon intended as far back as 1873 to dedicate Gotha-street to the public as a public road or highway. When the property was assessed as a whole he successfully exerted his influence to get it assessed in subdivisions, to the majority of which there would have been no access but through Gotha-street. He paid no assessment on Gotha-street during the time that the property remained in his hands, and before the sale to Dr. Quinn he offered the whole of the land for public auction, describing the land in the advertisement which preceded the sale "as having been subdivided into twenty allotments, Gotha-street intersecting them, so that the property is divided in two," and recommending the site to the attention of purchasers as being "equally adapted for business or private residence purposes." We consider this conduct on the part of Mr. Gibbon amounted to unequivocal acts of dedication. In *Woodyer v. Hadden, 5 Taunt, p. 136,* Mr. Justice Chambre, by way of illustrating the manner in which an immediate act of dedication may take place, puts the following case:— "If a man builds a double row of houses, opening

into an ancient street at each end, making a street, and sells or lets the houses, that (*i.e.* the street) is instantly a highway." On a question of evidence of an intention to dedicate a highway, we can see no practical difference between the position of a man who builds a double row of houses divided by a street, and that of a man who runs a street through a double row of allotments, which he puts up to auction for building purposes. The evidence of an intention to dedicate goes, however, still further back. In May, 1866, a conveyance was executed by Mr. Gibbon of subdivision 36 of eastern suburban allotment No. 67, and was deposited at the Real Property Office, accompanied by a plan of subdivision. This plan contained subdivisions of eastern suburban allotment No. 88, as well as of subdivisions of part of portion 67, and on the plan Gotha-street is shown as running from Leichhardt-street to Wickham-street, in a south-easterly direction, through portion 88 and that part of portion 67 which is bounded on the south-west by Wickham-street. The plan also shows subdivision 36 as abutting on Gotha-street. In September following, Mr. Gibbon executed in favor of one Andrew Gordon a conveyance of land described as being subdivision No. 1 of portion 67, bounded on the west by Wickham-street, which divides portion 67 into two parts. This conveyance to Gordon was deposited in the Real Property Office, and was accompanied by a plan, similar in all respects to the plan which was lodged in the office in May, 1875. It showed a continuation of Gotha-street, in a straight line to Ann-street, from that portion of No. 67 which abuts on the south-western side of Wickham-street, and it showed also two small roads or lanes, made at the rear of allotments 11, 12, 13, and 14, which have a frontage to Ann-street, which street would have been the only means of excess to these allotments, but for the lanes opening at the rear into Gotha-street; another lane opening into Gotha-street was also shown at the rear of allotments 19 and 20, which have frontages to Wickham-street, and which could only have been approached in that direction if some foresight had not been evinced by giving access to them through Gotha-street in the rear. With all this evidence of the dedication of a public highway before us we can have no hesitation in discharging the order *nisi* for a *mandamus*.

Solicitors for the plaintiff, *Murphy & Patterson.*

Solictor for the Registrar-General, *the Crown Solicitor.*

March 20th, 1879.

RE THE REAL PROPERTY ACTS, 1861 AND 1877, AND THE APPLICATION OF JOHN EATON.

Real Property—Registrar-General—Sale of Land —Title to Land—Issue of Certificate of Title 25 Vict. No. 14.

The Crown grantee of certain land sold it to a purchaser, and gave possession of the land and delivered the Crown grants to him. The vendors received the purchase money, but no transfer of the land was executed. Two years afterwards, the vendors disappeared and were not afterwards heard of. The purchaser continued in undisturbed possession of the land for twenty years after the purchase, and then applied to the Registrar-General to issue a certificate of title to the land in his name.

Held, that the purchaser was entitled to have the certificate of title issued.

Held also, that when a good *primâ facie* title to land is established, such as the court would compel a purchaser to take, a certificate of title ought to issue.

SUMMONS issued under the Real Property Act, 1861, sec. 27, at the instance of an applicant to the Registrar-General, to have land brought under the Act, and calling upon the Registrar-General to substantiate and uphold his refusal to bring the land under the Act.

Harding, in support of the summons; *Griffith, Q.C.*, for the Registrar-General.

LUTWYCHE, A.C.J.:—In this case a summons had been granted by a judge of the Supreme Court, at the instance of John Eaton, calling upon the Registrar-General to appear before the Supreme Court on the first day of Hilary term, to substantiate and uphold the grounds of the decision of the Master of Titles, in reference to an application of the said John Eaton, to bring under the provisions of the Real Property Acts of 1861 and 1877, and to issue a certificate of title therefore in the name of the said John Eaton, a piece of land in the parish and town of Maryborough, containing 21 acres and 37 perches, or there-

abouts, being suburban allotment No. 34 B, and to show cause why he (the Registrar-General) refused to bring the land under the provisions of the acts, and to issue a certificate of title accordingly.

It appeared from an affidavit of Mr. A. W. Chambers (one of the solicitors for the applicant), and the annexures thereto, that about the month of September, 1857, Eaton purchased the land in question from two Italians, Narrelli Angelo Delmonico and Andrea Spigalia Guiseppe, of Maryborough, and paid them the sum of £2 per acre for it; that immediately after the purchase of the land, and before December, 1857, Eaton took possession of it, and had continued in peaceable possession thereof ever since, that is, for nearly 21 years. It appeared also that the two Italians, who were the original grantees of the land from the Crown, handed over to Eaton at the time of the sale to him the Crown grant which had been made out in their names, but they were never requested to sign a transfer of the land to Eaton, and the sale note which they gave him has since been lost. The vendors left Maryborough about two years afterwards with the intention, according to Eaton's belief, of returning to Italy, but they were never seen afterwards by either of the three declarants who deposed to the circumstances attending the sale, and there was no evidence that went to show that they had ever left the colony. On the 18th November, 1878, Eaton made an application to bring the land under the provisions of the Real Property Act, and requested the Registrar-General to issue a certificate of title for it in his name. On the 12th December following, the Master of Titles, to whom the application had been referred, made a memorandum in the following terms:—"I do not think that applicant discloses sufficient title to authorise issue of certificate of title in his favor." On receiving this memorandum from the Real Property Office, Eaton's solicitors addressed a letter to the Registrar-General, requesting him, in pursuance of the 27th section of the Real Property Act of 1861, to set forth, in writing under his hand, the grounds upon which such memorandum was made, and on the 29th of January last, the Registrar-General replied by letter, as follows:—"The grounds stated by the Master of Titles for such memorandum are, that in his opinion the applicant, John Eaton, has not proved any title in or to the said allotment sufficient to entitle him to a certificate of title in respect thereof under the provisions of the Act referred to." The matter came before the court on motion, as prescribed by the Act, on the second day of the term (19th instant), Mr. Harding appearing for the applicant, the Registrar-General being represented by Mr. Griffith. Some difficulty in dealing with the matter brought before the court was occasioned by the general and vague terms of the reply sent by the Registrar-General to the request of the applicant's solicitors, to furnish them with the grounds upon which the memorandum of the Master of Titles had been made. And before proceeding further, we think it proper to say that, in our opinion, whenever such a request is preferred, the Registrar-General ought to set forth specifically the defects which it is considered are apparent in the applicant's statement of his title to a certificate. It would be a saving of time to the court and of expense to the applicant, (who it must be borne in mind is required by the 28th section of the Act of 1861, to bear not only his own costs of the motion, but the costs of the Registrar-General also,) if the arguments were confined to the real questions at issue, instead of being directed to every conceivable objection that the ingenuity of counsel can suggest. According to our view, the duty cast upon the Registrar-General by the 27th section of the Act is analogous to that which ought to be performed by a conveyancing counsel. The title set forth by the applicant should be narrowly scrutinised, and any apparent flaw in it should be clearly and plainly pointed out as a ground for the refusal to issue a certificate. If no such flaw be apparent, and a good *primâ facie* title be established, such as the court would compel a purchaser to take, a certificate of title might with advantage be issued. The arguments addressed to the court

proceeded mainly on the assumption that Eaton's possession of the land was adverse, and it was contended that 20 years adverse possession was not sufficient to make out a title against the true owner, unless his right of entry had accrued while he was in the colony, and *sui juris*. It was not disputed that in the case last supposed, the right of entry would not only be gone, but the title of the party who had neglected to assert his right of entry would be extinguished, and an indefeasible title be conferred on the person who had previously enjoyed a possessory title only. The rule is now well established, and has been applied not only to cases where the possession has been adverse from the commencement, but also to the case of a tenant-at-will, who held over after the determination of his tenantcy, and exercised acts of ownership, even with the knowledge and consent of the legal owner, (see *Day v. Day, L.R., 3 P.C. 751.*) It may be advisable in cases depending on possession to have a regular examination of witnesses before the Registrar-General. Some reliance was also placed on the contingency of a claim on the part of the Crown, which it was submitted would in itself have been sufficient to warrant the refusal on the part of the Registrar-General to issue to Eaton a certificate of title to the land in fee simple. But the assumption of an adverse possession on the part of Eaton is at variance with the facts disclosed by the case laid before the court. He derived his possessory title from the original grantees of the Crown, to whom he paid the purchase money for the land, and he has been in peaceable possession of it ever since. The vendors remained at Maryborough for two years after the sale, and there is no proof that either of them ever made any attempt to disturb his possession. Their title to the land is therefore extinguished, and as possession is in itself *primâ facie* evidence of a seisin in fee, there seems to be no ground for a refusal to grant the certificate, unless it be founded on some supposed right to the property on the part of the Crown. If, however, the Registrar-General considered that such a claim could be preferred, he should, we think, have proceeded under the 5th sub-section of the 11th section of the Act of 1861, and have entered a caveat on the behalf of the Crown accordingly, specifying the foundation of the claim. The applicant having purchased and paid the purchase money for the land under a contract in writing, and having entered into and remained in possession without objection or molestation by the vendors, and having received from them, and still holding the evidence of title (that is, the Crown grant) in his possession, might have come to the court and obtained a vesting order under the "*Trustees and Incapacitated Persons Act of 1867.*" For some reason, which though not apparent to the court, must be presumed to be satisfactory to himself, he has taken a more circuitous course, but we can only grant him that kind of relief for which he specifically prays, and the order we make is, that the Registrar-General do forthwith take proceedings to bring the land referred to under the provisions of the Acts of 1861 and 1877, and to issue a certificate of title therefore in the name of the said John Eaton.

Solicitors for the plaintiff, *Lyons & Chambers.*

Solicitors for the Registrar-General, *Daly & Hellicar.*

WILSON AND ANOTHER *v.* THE BANK OF NEW SOUTH WALES.

Real Estate—Personal Estate—Pre-emptive purchase of land—Death of purchaser before payment of purchase money—33 Vict., No. 10, s. 54.

C., being the lessee of Crown lands, applied in October, 1873, to pre-empt a portion of them under the 33rd Vict., No. 10, sec. 54. In November, 1874, the application was approved, and C. was directed to pay the amount of the purchase money and fees into the Treasury. In December, 1875, C. died without having paid the money, and in May, 1877, the widow and administratrix of C. applied to be allowed to complete the purchase, and was permitted to do so.

Held, that the land so purchased formed a part of the real and not of the personal estate of C.

SPECIAL CASE.

GEORGE CLAPPERTON was at the time of his death lessee from the Crown, under the provisions of the Pastoral Leases Act of 1869, of blocks of country in the unsettled district of Burnett known as Tarong and Neumgau. In October, 1873, he applied to pre-empt a portion of Tarong run containing 2,560 acres and a similar area on Neum-

gau. On November 4th, 1874, the application was approved, and he was directed to pay the purchase money and fees into the Treasury. On December 15th, 1875, he died, intestate, without having made the required payments, leaving his widow, the plaintiff, Annie Wilson (then Clapperton) and his son and heir at law, Thomas Alexander Clapperton, an infant, surviving him. In August, 1876, letters of administration of the estate and personal effects of the deceased were granted to the widow. In May, 1877, Mrs. Wilson (then Mrs. Clapperton) applied to the Government to be allowed to proceed with the application to pre-empt, lodged by Clapperton in 1873, and her request was granted. The payments necessary to be made to the Government amounted to £2,613, and in order to obtain the money to meet them Mrs. Wilson gave her promissory note for £5,000 to the Bank of New South Wales, who discounted the note and paid the £2,613 out of the proceeds. The grants of the pre-emptive lands were by mistake issued to the Bank of New South Wales instead of to Mrs. Wilson. On February 25th, 1878, Mrs. Wilson married the plaintiff, William Albert Wilson.

The questions for the opinion of the Court were—(1) Are the lands purchased by the plaintiff, Annie Wilson, portion of the real or of the personal estate of the deceased? (2) To whom are the said lands to be transferred? (3) Out of what fund or by whom are the costs of the case to be paid?

Griffith, Q.C., and *Cooper*, appeared for the plaintiffs; *Real*, for the Bank of New South Wales; *The Attorney-General (R. Pring, Q.C.)* for the Crown; *The Attorney-General (R. Pring, Q.C.)* and *Rutledge*, for Clapperton.

LILLEY, C.J.:—The first question submitted to us is "are the lands purchased by the plaintiff, Annie Wilson, as administratrix of the late George Clapperton, portion of the real or personal estate of the deceased?" To my mind that depends upon the question whether the deceased at the time of his death had indicated by a binding act, his intention to convert a portion of his personal estate into realty, in other words, to purchase these pre-emptive selections on the run of Tarong, and to convert them into estates in fee. It depends first upon the construction of the 54th sec. of "The Pastoral Leases Act of 1869," as applied to the transactions between Clapperton and the Government. Section 54 is as follows: "For the purpose of securing permanent improvements, it shall be lawful for the Governor to sell to the lessee of a run without competition, at the price of 10s. per acre, any portion of such run, &c." No doubt the contention of Mr. Griffith is perfectly right, that it is an option entirely vested in the pastoral lessee to say whether he will buy or not, and it seems to me there is a like option on the part of the Governor-in-Council to say whether he will sell or not. But the facts here go beyond that, they had entered upon negotiations for the purpose of selling. Then the next question is: "was there a complete contract for the purpose and sale of these lands?" That raises the second question of construction upon the facts set out in the case, and the letters which are part of the case for the plaintiff submitted to the court by all the parties. On the 18th October, 1873, we have two applications signed by George Clapperton, applying for the purchase, under his right, of 2,560 acres on "Tarong" and "Neumgau," respectively. Then we have the matter considered and dealt with by the Governor-in-Council, apparently, because I see here appended to the recommendations of the Minister this note, "The Lands Department to proceed with the necessary action," that is, in effect, the sale of these pre-emptive selections to Clapperton. Then, on the 24th September, 1874, the following letter was addressed by Clapperton to the Minister for Lands. "I have the honor to forward herewith tracings of the selections applied for by me on Tarong and Neumgau runs. The improvements on the Tarong selection are the head station, paddocks, &c., and on Neumgau, a large substantial stockyard, sheep station, hut and paling yards. I shall be glad to hear that the applications have been received and approved of." If the minute came after that letter, it would be even stronger evidence of a complete contract, but

whether it preceded or followed, on the 4th November there was a complete contract, certainly, between the Crown and Clapperton. The letter of the 4th November is as follows. "I have the honor to inform you that your application to purchase by pre-emption 2,560 acres on each of the runs called Tarong and Neumgau has been approved, and you will now have the goodness to make the payments into the Treasury shewn in the margin. On completion of the survey, the deeds of grant will be prepared for signature of His Excellency the Governor." It appears to me that here was a complete selection, an approval, and all that was necessary to be done was the formal survey of the land. The bargain for the purchase of the property seems to me to have been as plainly indicated as it could be between two subjects. Then the letter relied upon as shewing that there was not a complete binding sale,—that of March 30th, 1875,—namely, a request by Clapperton, that one of the boundary lines might be adjusted for his benefit, and it seems to me that there was no intention on his part not to comply with the conditions necessary to be performed by him to obtain the land he had applied for, and in respect of which it seems that on the 24th September, and certainly on the 4th November, 1874, there was a complete contract between the parties. So it remained. He died, and the delay on his part may be accounted for by his giving time to the Government to adjust the boundary, and that the Government had not had time so to do. Hence is not difficult to account for the delay, and there is nothing to lead me to suppose that the delay indicated any intention on the part of Clapperton to abandon the purchase which it seems to me he had then made. All the parties were at that time (on the equitable rule that things contracted to be done are looked upon as done), precisely the parties mentioned in section 54—the Governor-in-Council, and the lessee of the run. It is not necessary to say what might have happened under certain contingencies. Clapperton had done all that he could do to impress upon certain portions of his property the character of realty. My answer to the first question will be, therefore, that it was real estate. With regard to the second question, that follows easily enough, they must go to the heir, and as to the third, I think the plaintiff herself is entitled to her costs out of the personalty; the burden cannot be imposed upon her, she seems to have carried out the wishes of her deceased husband. I think the heir at law is entitled to his costs out of the personalty. With regard to the Crown, after the positive letter of Clapperton in his lifetime, warning them not to put the property in the name of the Bank, I do not see what claim the Crown has to costs; they will have no costs, and the Bank, having taken the deeds out of the Real Property Office, will not have their costs.

LUTWYCHE, J.:—I am of the same opinion and for precisely the same reasons given by the learned Chief Justice.

Attorney for the plaintiffs, *P. Macpherson.*

Attorneys for the Bank of New South Wales, *Little, Browne & Ruthning.*

Attorney for the Crown, *The Crown Solicitor.*

Attorneys for Clapperton, *Little, Browne & Ruthning.*

August 7th, 1879.

WICKHAM AND OTHERS *v.* KING.

Trustee—Executor—Trust estate—Trustee's accounts chargeable against—31 Vic., No. 9, sect. 6.

The provisions of the 6th sect. of the Probate Act do not apply to executors acting as trustees.

Trustees are not entitled by any practice of the colony to deduct anything from the trust estate by way of commission for their pains or trouble.

Held, that trustees were not entitled to charge any of the following items against the income of their *cestui que trust*:—Solicitors' costs in obtaining probate of the will in which the trust estate was devised to the trustees; in passing accounts in perfecting titles to part of the real estate; in calling in part of the real estate outstanding on mortgage, in connection with the disclaimer of an executor; estate agent's charges for valuing part of the real estate; fire insurance on buildings; commission on the sale of part of the real estate; exchange on remittance of part of the *corpus* of the property; commission allowed by the court to defendant as executor; premiums on Government debentures purchased for the estate; costs of passing accounts.

SPECIAL CASE.

JOHN WICKHAM died in the year 1864, having made his will, of which he appointed four executors and trustees, of whom only R. R. Mackenzie and the defendant proved the will. Mackenzie died in September, 1878, and in 1877, G. P. Heath and F. R. Chester Masters, plaintiffs in the action, were appointed trustees with the defendant. During Mackenzie's life he managed the trust estate, and after his death the management was carried on by the defendant. Accounts in the estate were filed by Mackenzie and the defendant, in which the following items were charged against the income arising out of the estate after the death of the testator:—for solicitors' costs in obtaining probate of the will, in preparing a lease of part of the testator's estate, in passing accounts, in perfecting titles to part of the real estate, in advertising for investments in calling in part of the real estate outstanding on mortgage, costs in connection with the disclaimer of an executor; estate agent's charges for valuing part of the real estate; fire insurance on buildings; commission on the sale of part of the real estate; exchange on remittances of income; exchange on remittances on part of the *corpus* of the estate; commission allowed by the court to the defendant as executor; premiums on Government debentures purchased by the defendant for the estate; costs of passing accounts.

The questions for the consideration of the court were, whether any, or which of the above items had been properly deducted from the income of the plaintiff, the *cestui que trust* or whether any, or which of them should be deducted from the *corpus* of the trust estate.

Pope Cooper appeared for the plaintiffs.

Griffith, Q.C., and *Real* appeared for the defendant.

LILLEY, C.J.:—The questions submitted by the special case for our consideration are, whether any and which of the numerous items mentioned in the paragraphs from 21 to 31, inclusive, have been properly deducted from the income of the plaintiff, Ellen Wickham, or whether any or which of them should be deducted from the *corpus* of the trust estate. I think we have hardly before us sufficient materials to determine the second branch of the question, and we shall not go further with the case than the course indicated for us by the counsel for the plaintiff, namely, to decide whether the sums have been properly deducted from income. There may be questions as to apportionment of the commission or charges as between the trustee or executor and the remaindermen that we have certainly not sufficient materials before us to decide upon, and it seems to me that we are not called upon to do so. Our decision depends mainly upon the construction of the 6th section of the Probate Act. The Probate Act seems to deal entirely with questions relating to the duties of executors and administrators, and in no way to touch the peculiar duties to be discharged by trustees. This section in making a statutory allowance to executors or administrators must be understood to be limited to the duties that they discharge as executors or administrators and not as trustees; that being so, the question here would be whether these deductions were such as could be allowed to them as executors. As I read the special case they appear to have been deducted from the income of the testator's estate after his death and in no way to have been deducted from the estate gathered in by the executors in converting the fund in their hands as executors to a trust fund. They have therefore been deducted from the trust income, and it seems to me that these deductions were not justified by the terms of the terms of the statute. Then, is there any custom entitling trustees to deduct anything in the nature of commission for their pains and trouble. Certainly there is no statute, and, except in Jamaica, I am not aware of any entitling a trustee to deduct anything from the income of his *cestui que trust* for his pains and trouble, and it seems to me that all a trustee would be entitled to take is the ordinary expense of collection. The courts at home have in cases where executors have gone out to India to manage estates allowed commission, but in such cases it was purely commission upon

their collections as executors. I am not aware that by the practice of any court trustees have ever been allowed commission for their pains and trouble, it has certainly not been the practice here within my knowledge. The reason for the allowance in India and Jamaica does not apply to Australia because there is no difficulty here in getting people to act. There being no reason then I do not see why we should establish the practice in this court: if allowances are to be made to trustees it must be the subject of legislative enactment. The legislature has provided for executors and administrators and not for trustees. I think upon that we may say that the commissions to King and Mackenzie were not payable out of income. My construction of the 6th section of the Probate Act seems to be supported by the proviso to the 23rd section of the Supreme Court Act, as pointed out by Mr. Justice Harding, "that no suits for legacies or suits for the distribution of residues shall be entertained save by the Supreme Court in Equity." That shows very strongly that the Probate Act was pointed simply to the duties of executors and administrators. The commissions will not therefore be payable out of income. The items for passing accounts certainly cannot come out of income; there is nothing to compel a trustee to come into court to pass his accounts until a suit is instituted for the purpose, although he is bound to have them ready to show to his *cestui que trust* when required. The insurance on Newstead, upon whatever fund that may be chargeable—we say nothing about the *corpus*—we think cannot be deducted from the income of the *cestui que trust*; the trustee was not compelled to insure however prudent it might be to do so. At first it struck me that the *cestui que trust* might have consented to insure, but it appears she did not. The £3 8s., for the lease, and the 15s., must be paid out of income, and as to all the others, they are not payable out of income out of whatever fund they may be payable. The costs of all parties to be paid out of the *corpus*.

LUTWYCHE, J.:—I concur in the views expressed by the learned Chief Justice. With reference to the items I think they are not chargeable to income with the exceptions mentioned by him. With regard to the orders they were perfectly regular, and the only reason why this case has been drawn up is the intention on the part of King and Mackenzie to encroach upon a fund which was not properly before the court. They simply misapprehend the effect of the order in both cases. The order did not mention any fund out of which the commission was to be allowed, and the orders both purport to have been made and were made in favor of the executors as executors for their pains and trouble in the administration of the estate, and the court must have had in contemplation that the commission would be deducted by the executors from the fund which was legally available for that purpose; it appears, however, that they laid their hands upon the income of the widow. They made a mistake. Having said that, I have said all that is necessary to say upon the subject. With regard to the case that was cited yesterday, "*In re Turner*"—in that case there was an allowance made in the nature of commission by the court in favor of a person who had been substituted under the will of Turner as a trustee, but he had been substituted a little before the death of the only surviving executor, and he was the only person who was able to act and did act in the administration of the estate, and the allowance by way of commission was made to him, not as a trustee, but as an administrator of the estate. It was an exceptional incident; whether right or not I need not say. Probably it would not be desirable to extend the application of the principle, but being a very rare case it is hardly worth while to make any further comments upon it. It was an exceptional case, and was so dealt with by the court.

Attorneys for the plaintiffs, *Hart & Flower*.

Attorneys for the defendant, *Little, Browne & Ruthning*.

August 8th, 1879.

REGINA *v.* BARTON.

Marriage — Time of celebration of — Validity of marriage—Bigamy—Bigamous marriage beyond jurisdiction of the colony—29 Vict., No. 11—28 Vict., No. 15, sect. 11.

The 11th sect. of *The Marriage Act, 1864*, is merely directory, and therefore a marriage celebrated before 8 o'clock a.m. or after 8 o'clock p.m., is not on that account void.

The statute, 9 Geo. IV, cc. 31 & 83, are repealed in this colony by 29 Vict., No. 11, and the repeal is not limited by the latter or any other statute from affecting the jurisdiction of the Supreme Court. Consequently, the court has no jurisdiction in the case of a bigamy or other offence committed outside of the colony and its dependencies.

SPECIAL CASE RESERVED.

The prisoner, in the year 1874, was married in Queensland by a minister. The marriage was regular in every respect excepting that it was celebrated after the hour of 8 o'clock p.m. Some time after the celebration of this marriage the prisoner went to England and there went through the form of marriage with another woman, the first wife being still alive, and then returned to Queensland. The question reserved for the consideration of the court was whether the first marriage, having been celebrated after the hour of 8 o'clock p.m., was valid.

Swanwick appeared for the prisoner.

Lilley, C.J.:—The question reserved by this case for our decision is, whether a marriage after 8 o'clock in the evening was valid? If it was, then the prisoner's second marriage during the life of his first wife was bigamous, and the conviction must be affirmed. If the first marriage was not valid, then the second was lawful, and the conviction must be set aside. Our decision must depend upon the effect to be given to the proviso to the 11th section of *The Marriage Act of 1864*, which is as follows:—"Provided that no marriage celebtated by any minister or registrar shall be deemed to be legal or valid unless celebrated between the hours of 8 o'clock in the morning and 8 o'clock in the evening." It will be observed that the prohibition is absolute. It depends in no way on the will, knowledge, intention, or good or bad faith of the parties to the marriage. It is fatal to the innocent, who believe themselves to be marrying within the prescribed hours equally with the wilful or designing who may be knowingly marrying out of time. All the clocks in the village may indicate the hour to be *seven*, but if it can be shewn by exact scientific observation that it was in fact one minute past *eight*, the marriage will be void. At any time, however distant, the proof of this circumstance will avoid the marriage. Time has no healing influence upon it. The evidence of some local philosopher with his chronometer, if believed by a jury, will suffice to invalidate a marriage solemnised in good faith, sever the long established and publicly recognised relation of man and wife, reduce a seemingly legitimate family to bastardy, and deprive them of their right to their ancestors' property. The language of a statute must, however, receive the interpretation conveyed by its ordinary meaning, however cruel or oppressive may be the consequences. It is binding upon us to give effect to the intention of the Legislature, if it is clear and unmistakeable. If the whole law on the subject is consistent, and pronounced to one end, it must take its course. Section 12 of the statute which follows the above proviso, is as follows:—"Every marriage which shall be celebrated by any minister or registrar as aforesaid, after oath or solemn affirmation so made, shall be a legal and valid marriage to all intents and purposes, and no other marriage, except as hereinafter provided, shall be valid for any purpose." This section would seem to be unnecessary if it were not inserted to show that some of the preceding requirements are essentials, whilst some of them are only directory. If this section was intended by the Legislature to point out all the essentials to the validity of the marriage, it is inconsistent with the absolute terms and effect of the proviso in the 11th section. In such a case there is a clear rule of interpretation for our guidance, the later provision of a statute gives the law and prevails over an inconsistent preceding one. Section 12, when it speaks of a marriage

property in the bridge, including the approaches, was handed over to the Government, and that those Acts had the effect of abolishing tolls on the bridge for all future time, unless authorised by express enactment, and not merely the effect of abolishing the particular toll then charged. That the *Local Government Act of 1878*, being a general enactment, which vests in the Corporation *(sec 240)* all bridges within the Municipality was not sufficient to repeal the *Bridge Acts* which vested the Victoria Bridge in the Government, and to repeal the provisions of those Acts as to tolls not being charged on the said bridge. That the section giving the Council the right to charge tolls upon bridges belonging to the Corporation sustained the construction that the Victoria Bridge did not pass from the Government, and went to show that the general act was not intended to pass it. That section 245 of the *Local Government Act of 1878* shewed specially that section 240 was not intended to pass anything concerning which there was a special act, and therefore that it was certainly not intended to pass this bridge. That section 245 also only gave the Governor-in-Council power to proclaim bridges under the charge of the Corporation where they were within the Municipality. That the word "control" in section 236 was capable of two constructions, as shown by its use in section 167 and in By-law 24, and that the word did not mean "maintain or construct." That if the proclamation of the Governor was to have the effect of bringing the bridge under the provisions of the *Local Government Act*, it would in effect be repealing the provisions in the acts as to tolls. That the construction of the *Bridge Acts* was that tolls should henceforth cease, and that the general enactment would not be sufficient to empower the Corporation to reimpose tolls. That the fact that the general enactment empowering the Corporation to impose tolls had been passed, strongly supported the contention that the bridge was not intended to be included under section 245, or under the Act at all, and, therefore, the Governor's proclamation under section 245 would have no effect, and would not apply to it. Assuming that the bridge was brought under the control of the Corporation, then he submitted that a meaning could be given to the word "control" in section 236, and to the words "charge and management" in section 245, and that the general enactment would not do away with the provisions of the *Bridge Acts*, and would still leave with the Government the duty of maintaining the bridge free of tolls. Lastly, he contended that the Corporation were not bound to repair or maintain the bridge at all, which was a question that had never been decided, and he further cited the following cases:—*Williams v. Pritchard, 4 T.R., 2; Eddington v. Bonnan, 4 T.R., 4; Borough of Bathurst v. Macpherson, 4 App. Cases, 256; Winch v. Conservators of the Thames, L.R., 7 C.P., 448*, on appeal *L.R., 9 C.P., 415; Conservators of the Thames v. Hall, L.R., 3 C.P., 415.*

LILLEY, C.J., in giving the judgment of the court, said: In this matter a rule *nisi* has been drawn up to show cause why a *mandamus* should not issue against the Municipal Council, commanding them to take upon themselves the care, maintenance, control, and management of the Victoria Bridge. We think the rule is a little too large in its terms, because the law has thrown upon the council the control, care, charge, and maintenance of the bridge; and it is quite possible if we allowed this rule to go in these terms, whenever there was a lack of repair upon the bridge, or any other neglect of control or management exercised by the council, the Crown would come back upon this general rule instead of applying for a rule for the discharge of a particular duty. We think, therefore, it would be better to confine our judgment to the matter which has actually been submitted to us—in effect, can the Government hand back to the council the Victoria Bridge, or in other words—in more limited terms as stated by Mr. Real—are the council liable to maintain the structure of the bridge under the proclamations which the Governor-in-Council has issued since the passing of the *Local Government Act?* That will depend upon the various constructions which have been submitted to us—upon our general opinion upon

the various matters which have been submitted to us by Mr. Real. We think that the *Bridge Act of 1876* and the following Act of 1877, under which the Government acquired the property in the Brisbane Bridge, left nothing further to be performed in the interests of the municipality—I mean, left nothing further at that time to be performed by the municipality. It was a complete purchase by the Government. They took over the whole control, management, and maintenance of the bridge; and by the Act giving them the property in the bridge it was freed from tolls. It was handed over to a body which probably has no authority to impose tolls. The Governor-in-Council has no authority to impose tolls upon the bridge. He can only do that by virtue of some statute giving him the necessary power. It was passed from a body having authority to impose tolls, to a body having no such power without a special statute. The bridge, then, was freed from tolls. We think the language of the statute means nothing more than this—the existing tolls shall "cease and be determined." So far as that Act was concerned, there was no power given to the Government, who became the possessors of the bridge, to impose tolls. *The Municipalities Act*, which was in force at that time was repealed by the *Local Government Act* which was afterwards passed. We think that the determination of the questions submitted to us depends entirely upon the *Local Government Act of 1878*. Now, by that Act, by section 167, the municipality has power to open and regulate the width of new public or private roads and ways. They have power, by section 248, to establish tolls, rates, and dues upon any road, bridge, and any works, and to make the necessary by-laws for the collection and management of such tolls, rates, and dues. Then, by section 237, "the council of every municipality shall have the care, construction, and management of all public bridges," and other public works. It is only necessary to refer to bridges. By that section, then, the council of every municipality "shall have the care, construction, and management of all public bridges." By the proviso to that section —I only refer to this proviso for the purposes of construction—"the council of a shire shall not be charged with or bound to see to the construction or maintenance of any main road." Now, what is the meaning of the words "care, construction, and management used in that section, or of the word "control," which is used in the 236th section? We think that, although "control" will ordinarily mean government or management, still, looking at the statute, it has a wider interpretation, and includes maintenance, more especially when it is coupled with the words "care and management." We think the proviso shows that the words "care, construction, management, and control," include maintenance, because it was thought necessary by the Legislature in the proviso to except "maintenance" in the case of a council of a shire. If they had not made that exemption, the Legislature manifestly thought that "care, construction, and management" would have included maintenance. That being so, then we have the 240th section, which vests the materials of all public highways, bridges, and so forth, and all matters and things appurtenant thereto, in the municipality of the district within which the same respectively are. Upon that arises the question which was argued strongly by Mr. Real—Whether the Brisbane Bridge is within the municipality? We think that the bridge is within the municipality. The bridge is a highway carrying a road on one side of the river over to the other, both sides of the river—that is, the land on both sides of the river—being within the municipality. The bridge, in fact, is a portion of the road linking the two halves of the municipality together. The abutments on each side are within the municipality—on one side in the north side, and on the other in the south side. It certainly cannot be said that the bridge is outside the municipality. If it had been a bridge with one arch it might have gone over without touching the soil or water of the river, which we think is not within the municipality; but there was an original authority given by statute—and this has

not been in any way revoked—giving the constructors of the bridge within the municipality of Brisbane leave to rest in the bed of the river the piers necessary for carrying the mid structure of the bridge. There they have rested ever since. We think by a necessary construction that the bridge is within the municipality of Brisbane. I have described the structure as nearly as I need to show the foundation of our opinion. But if it needed any further support than our opinion in that respect, the 236th section of the *Local Government Act* provides that—

> Where any river creek or watercourse is so situated that at any place one bank thereof only is within the municipal district of any municipality the Governor-in-Council may by proclamation order and declare that any bridge or ferry across such river creek or watercourse at such place and the approaches thereto or so much of either bank at such place as may be necessary for the convenient construction and use of a bridge or ferry and proper approaches thereto respectively thereat shall be under the control of the council of such municipality.

"Control" here, we think, has the meaning which we ascribe to it—that it includes maintenance; and we think the effect of the proclamation under this section would be to bring the bridge within the municipal government and within the municipality, even if the material structure of the bridge happened to be just outside the municipality. Of course that is putting the argument even more strongly against Mr. Real's contention than is needful in this case, because the bridge, as I have said, rests its two ends actually within the municipality. Then we have here the bridge situate within the municipality—the property of it—that is, the materials of the bridge—vested in the municipality. As to that vesting, it was contended by Mr. Real that, this being a general enactment, it was not sufficient to divest the property of the bridge which had been previously vested in the Government of the colony. There is no doubt that artificial rules, where there is nothing else to assist in the construction of a statute are very useful, but we think that the artificial rule just referred to does not apply here. That statute is passed after the passing of the *Bridge Act* vesting the property in the Government. The language of the 240th section is certainly large enough in itself to divest the property out of the Crown; and it is to be observed that in the old *Municipalities Act*, which was repealed by the *Local Government Act*, there was no provision vesting the property of streets and bridges in the Municipal Council. There seems to have been some reason, therefore, for passing this 240th section. All the roads and bridges and streets in the colony would be vested in the Crown if this section had not been passed, and there is nothing in it to show that it was the intention of the Legislature that there should be any exception. All the bridges constructed in the various districts were previously the property of the Government, but this Act sweeps them all into one general class and vests the property in the various municipalities—in the Brisbane municipality in the case of the Victoria Bridge. The only other question raised is—What was the effect of the Governor's proclamation? By section 245 there is a reservation—an exemption from the jurisdiction of municipalities in favour of the Government under certain circumstances. It is provided that—

> Nothing herein contained shall authorise the interference of any council with any public road street bridge ferry wharf or jetty not formed constructed erected or established by such council and which may be excepted from the jurisdiction of such council by any proclamation made or to be made by the Governor-in-Council or respecting which separate provision shall have been or shall be made by any Act. Provided always that the Governor-in-Council may by proclamation authorise any council to take upon itself the charge of any such public road street bridge ferry wharf or jetty within the limits of the municipality.

Well, that the Government has done. What is the meaning of the word "authorise?" We think, that it means that the Governor may place any bridge within the municipality under the "care, control, and management" of the municipality, and they must take it. We think, that "authorise" really means looking at the rest of the section as well, that when the Governor-in-Council has issued a proclamation, it is an im-

perative duty on the part of the Municipal Council to perform the statutory provisions. By a subsequent part of the same section (the 245th) it is provided that—

Upon any such proclamation as last aforesaid any existing trust or other provision for the management control or other dealing with any such public road street bridge ferry wharf or jetty as aforesaid created in pursuance of any Act then in force or by other competent authority shall thereupon and thereafter cease and determine.

So that in effect, if there had been anything left in the *Bridge Acts of 1876* and *1877*, it was taken away by force of this subdivision of section 245. We think there is nothing more to say upon it. We will limit the rule. With the large expression of opinion which we have given for the general guidance of the parties on the whole question, our command will simply be that the writ issue. Of course it will not be necessary to take the writ out, but the rule will be made absolute, commanding the corporation to repair the bridge. That will be quite enough.

Solicitors for Corporation, *Macpherson & Miskin.*

Solicitor for Crown, *Crown Solicitor.*

IN CHAMBERS.

LILLEY, C.J. June 24. July 2, } 1884.

READY *v.* BYRNE.

Practice — Abortive Trial — Discharge of Jury — Second Trial—Taxation of Costs—Fees of Counsel.

In this action, which was one for defamation, there were two trials, the first of which was abortive, and the jury were discharged without giving a verdict. On the second trial the verdict of the majority was taken by consent, and £50 damages given for plaintiff. At the trial an order was made disallowing the plaintiff the costs of the first trial. (*Vide supra*, p. 8).

On a summons for review of taxation of plaintiff's bill costs taken out by defendant—

Held:—That plaintiff was only entitled to costs of such matter prepared for the first trial as was available and used for the second trial. And that the costs of the attendance of witnesses should only be allowed from the date of the close of the second trial.

Lambert v. Lyddon, 4 D. & L., 400; and *Lord v. Wardle, 6 Dow, 174* extended.

Henderson v. Adelaide Fire and Marine Insurance Company, 1 Austn. Jur. 116, followed.

The defendant had also paid his leading and junior counsel equal fees on the brief on the trial and the Master had allowed the fee to junior counsel at two-thirds of the fee paid to the leading counsel.

Held:—On a cross summons, taken out by defendant to revise the taxation and allow the junior an equal fee, that the allowance was right.

Lilley for defendant cited *Bird v. Appleton, 1 East 111; Edwards v. Brown, 1 C. & J., 354; Lickbarrow v. Mason, 6 T.R, 131; Brown v. Clarke, 12 M. & W., 25; 1 D. & L., 409; Henderson v. Adelaide Fire and Marine Insurance Company* (*Supra*).

Power for plaintiff.

LILLEY, C.J., In this case, on the trial I refused to allow the plaintiff the costs of the first trial. There has been a taxation, and this is an application for a review, the defendant objecting to various charges for witnesses on the first trial and for briefs. There was another point as to the judgment, which I decided in favor of the defendant and ordered an amendment. I also intimated my opinion on the authority of a Victorian case *(Henderson v. Adelaide Fire and Marine Insurance Co., 1 Australian Jurist, 116),* which I said I should follow, that the cost of witnesses up to the time of the finish of the first trial should be disallowed, and all costs, except the costs of attending from the date of the close of the first trial to the close of the second, will be disallowed. Then with respect to the briefs, I have found upon a research on my own account, a case which, I think, determines the matter, at all events lays down a principle which will guide us—*Lambert v. Lyddon, 4 Dowling & Lowndes, 400.* There is no doubt that the costs of the briefs are costs of the trial, and would be entirely lost except so far as they were available and used for the second trial. In *Lambert v. Lyddon* there had been a trial, the plaintiff had failed, a new trial had been ordered but the parties compromised, the plaintiff being allowed his costs as if the second trial had taken place, and the verdict had been given for him. Then the question came up as to what costs of

this colony formed part of the colony of New South Wales, the doubt, whether under the Imperial Statute the court had jurisdiction was exploded by the decision in this case, at page 48. The Chief Justice, in his judgment, says:—"The doubt which I suggested at the trial has been removed by further considering the words of the statute creating this offence. That statute was, by the 9 Geo. IV., c. 88, incorporated in our laws, and is therefore the law of the colony. If the enactment has been passed by a colonial legislature it would have no force as to marriages contracted elsewhere than in the colony legislating. But the British Parliament has legislative authority over all the colonies, and over all British subjects everywhere. I think, therefore, that the courts of this colony have jurisdiction over the offence, although committed out of the colony." That case was subsequently followed by *Reg. v. Rogers, 9 N.S.W. Reports, 34.* Since then the legislature of this colony, I assume, with a knowledge of the law and the effect of these decisions, has by subsequent enactments done something which has had the effect of lessening or diminishing the jurisdiction of this court, as I hold there can be no doubt as to the meaning of the legislature when it passed *The Criminal Statutes Repeal Act of 1865.* Before it had passed that Act it had passed *The Offences against the Person Act of 1865*, the 58th section of which relates to bigamy. That Act in that section merely took the corresponding section of the English Act, 9 Geo. IV., c. 81, and altered the word "England" to "Queensland," and otherwise adapted it to this colony. *The Criminal Statutes Repeal Act of 1865* recites, that by several Acts of the then present session of Parliament of which *The Offences against the Person Act* formed one, divers Acts and parts of Acts, amongst which 9 Geo. IV., c. 81, was included, have been consolidated and amended, and that it is expedient to repeal the enactments so consolidated and amended, and proceeds to repeal amongst others the Act 9 Geo. IV., c. 81. Consequently, this 22nd section of 9 Geo. IV., c. 81, was swept away, and being swept away nothing remained but the enactment passed by the colonial legislature—namely, *The Offences against the Person Act of 1865*, which has no force in respect of marriages contracted beyond the colony. Should this conviction be sustained, another difficulty strikes my mind. A prisoner who has once suffered his punishment is entitled to plead that he has been convicted and suffered the punishment, and is not liable to be again convicted for the same offence. Now in another British possession some distance away from here, supposing this man was tried again, he would say that he had been already tried and convicted, and had suffered his punishment in this colony under the Consolidated Act. The court trying him would say it was beyond the power of the Queensland legislature to enact an Act whereby a crime, which is local, and which had been committed outside their jurisdiction, is made amenable to the laws of Queensland, and he would be convicted and punished; and so he might be tried and punished in every place of Her Majesty's dominions where there is a separate jurisdiction. The strange result of this legislation seems to be that this is the only part of Her Majesty's dominions where this man is safe. The answer I give to the second question is, that this court has no jurisdiction.

Attorney for the prisoner, *Norris.*

July 15th, 1879.

MACDONALD *v.* TULLY.

Pastoral Lease—License to Depasture—Contract—Evidence—Damages—Measure of—20 Vict., No. 15—29 Vict., No. 23.

H. having tendered for certain blocks of country, the tenders were accepted on the 17th July, 1861. Previous to the acceptance M. purchased all H.'s estate, right, title, and interest of, in, and to the said blocks or runs. H.'s interest in the blocks was transferred to M., with the sanction of the Government, and on the 23rd July, 1861, he was informed by the Government that the runs had been transferred to him. M. held possession of the runs and occupied them with stock until the year 1866, and paid all the rents and assessments upon them, and applied to have leases of the runs for 14 years granted him by

the Government. On the 13th March, 1866, the Government declined to grant him leases of the runs, but in 1867 granted him leases of country which they alleged to be the runs. About June, 1866, M. received notice from R. to remove his cattle from the runs, and was also requested and directed by the Government to remove them. M. having brought an action against a nominal defendant appointed by the Government under *The Claims against Government Act* for damages for the loss of the runs, evidence was admittted at the trial that in valuing pastoral country, good sheep country, such as that in dispute, was estimated at so much per head for the number of sheep on the station, the market value per head being increased when the number of sheep was comparatively small for the grazing capabilities of the run, and lowered when the run was more largely stocked, and the learned judge directed the jury that the measure of damages was the loss which M. had sustained through losing the country and removing his sheep, and that they might give interest on the amount of damages awarded.

Held, that there was a sufficient contract binding upon the Government to grant a lease of the runs.

That there was a breach of contract committed by the Government, entitling M. to a remedy from the Crown under *The Claims against Government Act*.

That M. could recover unliquidated damages.

Held also, that the evidence was properly admitted, and that the jury ought not to have been directed not to give damages for the speculative loss of good will, premium, or business profits, and that they ought not to have been directed that they might give interest on the damages awarded.

An action to recover damages for an alleged breach of a contract to grant a lease of certain land was brought by the plaintiff against the defendant in the Supreme Court, by virtue of a petition presented to the Governor, under *The Claims against the Government Act* (*20 Vic., No. 15*). The petition, in accordance with that statute, was referred to the learned judges; an order was made that the petition be treated as a writ, and the defendant appointed by the Government as nominal defendant.

The plaintiff's statement of claim set out that in 1858 one James Leith Hay, then of Rockhampton, tendered, under the Orders-in-Council then in force, for certain blocks of country under the names of Kilmore, Dura, and Ludwig, in the Leichhardt district, which was then a part of New South Wales. W. H. Wiseman, the then Commissioner for Crown Lands for that district, examined the blocks of country and marked their boundaries; on July 17, 1861, the tenders were accepted. On or about April 2, 1861, the plaintiff purchased from Hay all his "estate, right, title, and interest of, in, and to the blocks of country;" and such interest was duly transferred, with the sanction of the Government, to the plaintiff, in accordance with the regulations then in force. Notice of the transfer was duly given in the *Government Gazette*, and the plaintiff was also informed by the Government that the runs had been transferred to him by a notification under the hand of A. C. Gregory, then Chief Commissioner of Crown Lands. The rent and assessment required to be paid in respect of each of the runs, together with all other charges in connection therewith, were duly paid into the Treasury during the time the plaintiff remained in possession. The plaintiff stocked and occupied the runs in accordance with the law then in existence, and had never been guilty of any act whereby a forfeiture might have accrued, or whereby his right to have leases granted to him was lost. He held undisputed possession of the runs from the date of the transfer until the time when the Government refused to grant him leases of them; and during such possession spent large sums of money in improvements and making the country available for pastoral purposes, in addition to the heavy expenses incident to averting the attacks of the then hostile aborigines. On March 13, 1866, the plaintiff had done all that was necessary to have leases of the country granted to him; but on that date the Government refused to perform the contract which he alleged they had entered into, or to grant him leases of the runs—except of a very small portion, entirely insufficient for pastoral purposes—and with this exception they had ever since ignored and denied his right to such country, and had concurred in his eviction from it. On May 9, 1866, the Government granted leases of the runs, with the exception referred to, under the names of Springsure, Spring Creek, and Miallo, to John Fraser, William Manson, and William H. Richards, carrying on business as graziers under the style of W. H. Richards and Co. On May 31, 1866, the plaintiff

received a notice from this firm, cautioning him against further trespass upon the runs of Springsure, Spring Creek, and Miallo, and ordering him to remove therefrom all sheep and stock then being depastured upon them; threatening further that, if this were not done within forty-eight hours after the receipt of the notice, plaintiff's sheep and stock would be impounded. In consequence of the receipt of this notice, and the fact that Richards and Co. held the leases mentioned the plaintiff was forced to give up possession, and at the request and by the direction of the Government did so. In December, 1867, the Government issued leases to the plaintiff of certain lands therein described, those lands consisting in part of the small portion of the runs of Ludwig, Dura, and Kilmore, already referred to, and of country not forming part of these runs, but of which the plaintiff was then, and had been for some time, in possession, under the names of Glenora, Fernlees, Yangorra, and Glenora No. 2, and to leases of which he was then entitled In consequence of such action on the part of the Government, and his eviction from the said country, the plaintiff alleged that he suffered great loss; that he had been deprived of the right to use and occupy such runs for pastoral purposes, of the profit which would have resulted from such occupation, and of the value of his improvements; that he was prevented from disposing of the country and the stock thereon at a considerable profit; and that he had incurred great expense in endeavouring to procure the granting of the leases in question. He estimated the loss which he had suffered by the refusal of the Government to grant such leases, and by the other circumstances set out, at £20,000, and claimed that sum and such further and other relief as the nature of the case might require.

To this statement of claim the defendant demurred on the following grounds:—1. That it disclosed no valid claim which could be maintained against the Government of Queensland within the meaning of the Act, 20 Vict., No. 15. 2. That it showed no right accruing to the plaintiff capable of being enforced under such statute. 3. That it showed no actual peremptory legal right accruing to the plaintiff to demand from the Government the issue of the leases to the plaintiff. 4. That whilst it sought to claim damages for a refusal by the said Government to grant leases to the plaintiff, it showed no right on the part of the plaintiff to enforce the issue of such leases to him, or to claim damages for any such refusal. 5. That it sought to recover unliquidated damages, but failed to disclose a sufficient cause of action maintainable under Act, 20 Vict., No. 15. The defendant also demurred to so much of the statement of claim as alleged as breaches of contract, the refusal of the Government to grant leases of the land in question, on the grounds—(1) that it disclosed no contract or engagement with the plaintiff to support the breaches complained of, and (2) that it did not show that the plaintiff made any demand or request for the grant to him of the leases referred to; and to so much of the statement of claim as related to and alleged, as a cause of action, the eviction of the plaintiff by the defendant, on the grounds—(1) that the said matters disclosed no cause of action; (2) that no such action is maintainable under the Act, 20 Vict., No. 12, nor any action for wrong committed according to the matters stated; and (3) that unliquidated damages for an eviction cannot be recovered under the statute.

Griffith, Q.C., *Harding*, and *Real* appeared for the plaintiff.

The Attorney-General (Pring, Q.C.) and *Garrick* for the defendant.

Lutwyche, J.:—This case comes before the court in the shape of three distinct applications. First, on demurrer to the plaintiff's statement of claim. Secondly, on a motion for judgment; and thirdly, on a motion for a new trial. The present plaintiff presented a petition to the Governor of the colony under *The Claims against Government Act* (20th Vict., No. 15), on the 20th December, 1867, and having been referred to the Supreme Court for trial, the cause came on in the ordinary course before me and jury of four at Rockhampton, on

the 29th of September, 1869, and lasted six days. The plaintiff claimed compensation from the Government in the form of damages in respect of the refusal of the Government to grant him leases for the runs of Dura, Ludwig, and Kilmore, in the Leichhardt district, and also in respect of his eviction from those runs. The jury found a verdict for the plaintiff, with £16,926 damages, but on the 6th of September, 1870, an order was made by the Full Court, then composed of the late Chief Justice (Sir James Cockle), and myself, by which the judgment was arrested. The plaintiff subsequently obtained leave to appeal to the Privy Council, but he did not prosecute his appeal, and the matter remained in abeyance for a considerable interval. A second petition was afterwards presented by the plaintiff to the Governor, in pursuance of the same Act, and was by him referred to the court, and an order was accordingly made on the 21st of October, 1878, that the matter of the said petition should proceed as an action under the *Judicature Act*. The claim made by the plaintiff in this proceeding was substantially the same as that which he had made under the first petition. The defendant demurred to the plaintiff's statement of claim, and after argument the court reserved its decision. The action was afterwards tried at Rockhampton, before Mr. Justice Sheppard and a jury of four, on Saturday, April 12th, 1879, and five following days, when the jury again returned a verdict for the plaintiff, awarding him £12,000 as damages, with interest amounting to £7,700 at 5 per cent. from June, 1866, to April, 1877. The learned judge, after the jury had delivered their verdict, directed judgment not to be entered then, and left either party to move for judgment. Accordingly, on the 6th of May, the plaintiff moved the court to enter judgment for him on the findings of the jury. The aguments of counsel on both sides having been heard the court took time to consider. The defendant, on the 9th of May following, having moved for and obtained a rule *nisi* for a new trial, cause was shown against the rule on the first day (May 20th) of the following term, and after argument in support of it, the decision of the court was reserved. The whole merits of the dispute between the parties having thus been fairly brought to the test of the law, it remains for the members of the court before whom the matters in question were argued to state the opinions which they have formed, and I proceed to express my own. It will be convenient first to set out in substance the pleadings, and then proceed to deal with the demurrer to the plaintiff's statement of claim. The plaintiff commences by alleging that in years 1858-9, one James Leith Hay tendered for certain blocks of country named Ludwig, Dura, and Kilmore, under the Orders in Council at that time in force in Queensland: that his tenders for the said blocks, described as situated on Minerva Creek, were, on the 17th of July, 1861, accepted by the Governor; that before such acceptance, viz., on the second day of April, 1861, the plaintiff purchased from J. L. Hay all his estate, right, title, and interest of, in, and to the said blocks or runs; that all Hay's interest in the same was duly transferred with the sanction of the Government to the plaintiff, and that the plaintiff was informed by the Government on the 23rd of July, 1861, that the said runs had been transferred to him; that the rent and assessment required to be paid in respect of each of the runs was paid into the Colonial Treasury, and that the plaintiff during the time of his possession of the runs regularly paid to the Government all moneys payable by him as such transferree as and for rent and assessment in respect of each of the runs. The plaintiff went on to state that he stocked and occupied the said runs in accordance with the laws and rules regulating the occupation of Crown lands in the colony; that he held undisputed possession of each of the runs from the time of the transfer until the time when the Government refused to grant leases of the runs to him, and that he occupied the same with stock from the 7th February, 1862; that during the period of such possession and occupation he expended large sums of money in improving the

runs and making them available for pastoral purposes; and that he had done all things necessary to entitle him to have leases of the runs for fourteen years granted to him by the Government. The statement of claim proceeded to allege that on the 18th of March, 1866, the Government refused to perform the contract made with the plaintiff, and to grant leases of the runs, except a very small portion thereof, entirely inadequate for pastoral purposes, and have ever since denied, with the exception aforesaid, his title thereto, and have concurred in his eviction from the runs by the firm of W. H. Richards & Co., to whom the Government granted leases of the runs, with the exception aforesaid, under the names of Springsure, Spring Creek, and Miallo. The statement of claim next averred that shortly after the 31st day of May, 1866, the plaintiff received a notice from W. H. Richards & Co., requiring him to remove all his stock from the runs, and informing him that they were then in possession of leases of them; that afterwards Richards and Co. gave the plaintiff notice that they would impound his sheep and stock unless he removed them within forty-eight hours after the receipt of such notice; that in consequence of the receipt of such notice and of the granting of the leases to Richards and Co., the plaintiff was compelled to remove, and at the request and by the direction of the Government did remove his sheep and stock from the runs. The statement of claim, after referring to the issue in December, 1867, of leases to the plaintiff of runs bearing the names of Ludwig, Dura, and Kilmore, but consisting partly of lands comprised of the said small and inadequate portion of the original runs of Ludwig, Dura, and Kilmore, which was excepted from the leases to Richards and Co., and partly of land of which the plaintiff was then and had long been lawfully in possession, under the names of Glenora, Fernlees, and Yangora, and Glenora No. 2, went on to allege that in consequence of his being compelled, requested, and directed to remove his sheep and stock, and of having so removed them, the plaintiff sustained grievous loss by such removal, and concluded with paragraphs (21 and 22) setting forth several heads of special damage and estimating the loss which he had sustained by reason of the refusal to grant him leases, "and the aforesaid premises" at the sum of £20,000, which he claimed from the defendant. The defendant, in his statement of defence, denied that the Government refused to grant leases to the plaintiff of Ludwig, Dura, and Kilmore, and alleged that on the contrary the Government did issue leases of those runs to the plaintiff; that after the plaintiff had purchased from Hay the runs of Ludwig, Dura, and Kilmore, as described and set forth in par. 5 of the plaintiff's statement of claim and after the transfer of the same to him, and after he had entered into possession and occupation of the same, certain disputes arose between certain persons named W. H. Richards and E. O. Moriarty relating to certain runs then held by them under accepted tenders from the Government, and situated on certain creeks named Arcturus and Springsure Creeks, and adjoining the southern boundaries of the plaintiff's said runs of Ludwig, Dura, and Kilmore; that when these disputes arose the plaintiff claimed to be entitled to a large portion of the country so in dispute between Richards and Moriarty, asserting that the creek called Springsure Creek, on which the runs in dispute were sitated, was the same Springsure Creek mentioned in the descriptions contained in the accepted tenders of J. L. Hay; that in consequence of such disputes a survey was made of the whole of the country so in dispute, and of the runs called Ludwig, Dura, and Kilmore; that after the survey, and on the report of a special board appointed by the Government to investigate the claims aforesaid, leases of the several runs called Ludwig, Dura, and Kilmore were, on the 31st day of December, 1867, granted and issued to the plaintiff and accepted by him; that such leases contained the descriptions set forth in pars. 6, 7, and 8, in the statement of defence; and that these descriptions comprised and included the whole of the available country situated on the

Minerva Creek, which the defendant alleged was the Minerva Creek mentioned in the descriptions of the blocks of country named Ludwig, Dura, and Kilmore, as originally tendered for by J. L. Hay. The defendant further denied that the Government concurred in the eviction of the plaintiff; and that by reason of the granting of the leases to W. H. Richards and Co. the plaintiff was compelled to remove, and that he did remove his sheep and stock at the request and by the direction of the Government; and he further alleged that the plaintiff voluntarily removed his said sheep and stock. The remaining portions of the statement of defence did not materially add to the foregoing statements relating to any of the points raised for the decision of the court. The demurrer to the plaintiff's statement of claim is set out at length on the record, and it is not necessary now to recapitulate *seriatim* the grounds of demurrer contained therein. It is sufficient to say that the arguments urged in support of the demurrer appear to range themselves under the following heads:—1. That Hay's interest in the runs was not transferable. 2. That the facts disclosed by the statement of claim did not show any contract on the part of the Government to grant leases of the runs to the plaintiff, no privity of contract appearing between them, and no novation or substitution. 3. That the Government had no authority to enter into such a contract. 4. That no demand or request by the plaintiff for the issue of the leases was alleged. 5. That the plaintiff's real cause of action, if any, was the eviction, which was a tort, and that tort could not be maintained in an action under the 20th Vic., No. 15; and 6. That unliquidated damages could not be recovered in an action either of contract or of tort under that Act.

1. The first point is entirely free from difficulty. It is admitted on the pleadings that the Government accepted Hay's tender for the runs of Ludwig, Dura, and Kilmore, and promised to issue to him, under the provisions of the Act 24 Vic., No. 12, sec. 8, leases for the term of fourteen years, commencing from the 1st day of July, 1861, subject to certain conditions, including the payment of an annual rent. Under this contract between Hay and the Government, the former obtained an inchoate right to leases at some future date, and this chose in action was assignable in equity, and was assigned to the plaintiff by Hay.

2. I think that the statement of claim clearly shows that in point of fact the Government did contract with the plaintiff to grant him the leases of the runs in question. The sixth paragraph of the statement of claim alleges that the plaintiff purchased all Hay's estate, right, title, and interest, in the runs in question, and that all Hay's interest in the same was duly transferred with the sanction of the Government to the plaintiff in accordance with the Crown Lands Regulations then in force. It appears also that to give publicity to the transfer a notice thereof was duly given in the *Government Gazette*, and that a notification of the transfer was sent to the plaintiff under the hand of A. C. Gregory, the then Chief Commissioner of Crown Lands. With these facts on the face of the statement of claim it seems to me that there was a novation, and that the Government accepted the plaintiff in substitution for Hay, conferring upon him all the rights which Hay would have retained if he had not assigned his interest to the plaintiff.

3. After the decision in Davenport *v.* The Queen, 47 L.J., P.C., page 8, by which the judgment of this court was reversed, it is too late to argue that the Government had no authority to enter into the contract with the plaintiff. It was contended indeed at the Bar that the action of Mr. Gregory was *ultra vires*, but the reasoning which pervades the judgment of the Privy Council in the case of Davenport *v.* The Queen leads me to the conclusion that in the opinion of the Court of Appeal the act of any subordinate officer of the Government, if done in the ordinary discharge of his duty, is binding upon the Government in whose service he is, unless perhaps it be distinctly repudiated at the time; and there is nothing to show in this case that the Government disavowed Mr. Gregory's action in the matter.

4. The statement of claim certainly does not allege that the plaintiff made any demand or request for the issue of the leases, but the 15th par. states that the Government refused to grant them, the refusal made a demand or request unnecessary.

5. The argument under this head proceeded upon the assumption that the remedies against the Crown by a petition of right, and against the Government of this colony by a proceeding under the 20 Vic., No. 15, were co-extensive and identical. There can be no doubt that as the law stands at present in England the Sovereign could not be sued for negligence, or for a wrong. (Viscount Canterbury v. the Attorney-General, 1 Phill., p. 306; and Tobin v. Reg., 16 Com. Bench, N.S. 355.) The proceedings in a petition of right are regulated by the Imperial Act, 23 and 24 Vic., chap. 34. That Act was passed subsequently to the Colonial Act 20 Vic., No. 15, which is in force in New South Wales and this colony. We may take it for granted, therefore, that the Imperial Legislature did not think it desireable to follow the example afforded by the *The Claims Against Government Act* and practically swept away the petition of right and the proceedings under it altogether. The preamble of the latter Act recites that, "Whereas disputes and differences have arisen, and may hereafter arise, between the subjects of Her Majesty the Queen and Her Majesty's local Government in the colony of New South Wales, the subject matter of which disputes and differences has arisen, or may arise within the said colony, and whereas the ordinary remedy by petition of right is of limited operation, and is insufficient to meet all such cases, and is attended with great expense, inconvenience, and delay;" and after this recital the Act goes on to enact certain provisions, including powers for the judges of the Supreme Court to make general rules and orders for the regulation of the pleadings, practice, or proceedings, under the Act. Soon after the passing of that Act the judges did make rules, six in number, for carrying into effect the objects of the Act, and so far as they have not been altered by our Judicature Act are, I apprehend, still in force. The second of these six rules requires that "the petitioner shall set forth specifically his claim, which may be in specie to some particular thing or matter, or in lieu thereof compensation for its loss or deprivation." After having fully considered that portion of the judgment of this court, which was delivered on the 6th September, 1870, relating to the rule in question, I feel bound to state that my present opinion is that a wider interpretation ought to be given to the rule than was given before. The words "which may be in specie" are introduced, it seems to me, parenthetically, and do not necessarily exclude things or matters which may not be in specie, and may embrace, without doing violence to the language of the rule, or the language of the preamble, not merely matters of contract, but matters arising out of the commission of a tort. (See further on this point the observations of Mr. Justice Manning in Nerney v. The Queen, *Sydney Morning Herald*, August 31, 1877.) Although, however, the so-called eviction of the plaintiff, in which the Government concurred, was a tortious act, it does not follow that the plaintiff founds his claim against the Government upon a tort. By virtue of the acceptance of the tender, the occupation and the stocking of the runs, and the payment of rent, the plaintiff became a lessee (see 24 Vic., No. 12, secs. 3, 4, and 5), and as a lessee was in possession of all the legal rights which he could have claimed and exercised if formal leases had been issued to him as evidences of his title. In every demise, whether by deed or parol, the law creates an implied warranty of the title on the part of the lessor, and it has long been held that an action of covenant will lie upon the words of a demise in a lease without any more explicit covenant for quiet enjoyment (Style v. Hearing, Cro. Jac. 78; see also 9 Vesey, 330). And although the warranty resulting by implication of law from a demise does not extend to wrongful claims, and evictions such as those made by Richards and Co., yet where the lessor is himself the disturber, an action may be maintained

on his covenant, though it be general in its term, and his disturbance wrongful (Corus v. Cro. Eliz. 544). The compulsory removal of the plaintiff from the run, as described in the 19th paragraph of the statement of claim, amounted in law to an eviction, and was a breach of the covenant for quiet enjoyment implied by the transfer of the runs from Hay to the plaintiff, for which he was entitled to damages. (See Carpenter v. Parker, 3 Com. B.N.S. 206; and see also Rolph v. Crouch, Law Rep. 3, Exch. 44). In the argument of this part of the case, as was to have been expected, reliance was placed at the bar on that portion of the former judgment of the court wherein the court expressed its opinion that the judgment ought to be arrested on the ground of the acquiescence of the plaintiff in the removal. Unfortunately the record on which the first trial of the cause was had has been lost. It appears by an endorsement on the original issue, in the handwriting of my associate, that the cause was tried on an amended issue, filed 20th September, 1869. It is useless to speculate now upon the nature of the amendment introduced into the amended issue, but there is strong ground for the belief that there was no averment of the concurrence of the Government in the compulsory removal of the plaintiff, or that it took place at their request and by their direction. The declaration in the original issue was confined to the acts of Richards and Co. in sending the two notices, and although it complained of the refusal of the Government to grant the leases it alleged dispossession by Richards and Co. only. And on a comparison of the exhibits which were produced and laid before the court at the first and second trials, it appears that although the same documentary evidence was adduced at the second which had been brought forward at the first trial, two important documents were produced at the second trial for the first time. These two documents are a formal memorial addressed by the plaintiff to the Governor of the colony, dated 9th April, 1866, and the reply to the memorial by the Under Secretary for Lands, dated the 14th May, 1866. The memorial endorsed in the handwriting of Sir G. F. Bowen, "The protest of Mr. P. F. Macdonald against the issue of the three leases to Messrs. Richards," is couched in very energetic language—so energetic as almost to overstep the recognised limits of official etiquette—and it certainly does not carry with it any impression that the plaintiff was content to acquiesce in the removal which was contemplated. He refers to a letter which he had received from the Chief Commissioner of Crown Lands, dated the 18th March previously, and intimating that leases were about to be issued to Messrs. Richards and Co. He characterises this course as "most arbitrary and unjust," describes the effect of it as "confiscation," and winds up by declaring "that this arbitrary proceeding, if enforced, may form a precedent for a course of policy which must prove destructive to the material welfare as well as the reputation of the colony." The official reply of the Under Secretary for Lands informs the plaintiff "that after a full and careful consideration of the several premises embodied in his memorial, the prayer of his memorial cannot be complied with; that the Governor has signed the leases for Springsure, Spring Creek, and Miallo, and that the plaintiff was at liberty, should he be so advised, to vindicate his claims under the Act 20 Vic., No. 15." It can hardly be supposed that the pleader who revised the amended issue would not have introduced these documents by stating their legal effect into the declaration if he had been aware of their existence, or that, if so introduced, the able counsel who conducted the plaintiff's case at the first trial should have neglected the evidence within their reach to support a part of the case so important to the success of their client. I cannot help thinking that if the record at the first trial had contained averments of the concurrence of the Government in the eviction of the plaintiff, and of the removal of his sheep and stock at the request and by the direction of the Government, the court would not have ordered the judgment to be arrested on the ground of acquiescence on the part of the plaintiff.

6. The last ground of objection raised by the argument on the demurrer to the sufficiency of the statement of claim may be disposed of more briefly than the point last mentioned. Here again the counsel for the Crown were able to rely on the language of the Court in arresting the judgment. The Court said on that occasion, referring to the Act 20 Vic., No. 15, "However far that Act may extend the remedies for, and facilitate the recovery of liquidated damages, it does not confer a right to claim as for unliquidated damages against the Crown." But since the delivery of the former judgment, the case of Thomas v. The Queen, Law Rep. 10, Q.B., p. 31, has been decided. In the very learned judgment which was then delivered on the behalf of the court by Mr. Justice (now Lord) Blackburn, it was conclusively shown that a petition of right will lie for a breach of contract resulting in unliquidated damages. If, then, unliquidated damages may be recovered under the proceedings in a petition of right, it would seem to follow that the same result might be looked for under proceedings taken in pursuance of the Act 20 Vic., No. 15, which professes in its preamble to take a wider range, and afford more extensive remedies than could be attained by a petition of right. And accordingly we find that in Nerney v. The Queen, reported in the *Sydney Morning Herald* of August 31st, 1877, the Supreme Court of New South Wales held that the petitioner would be entitled to compensation (which was necessarily in the nature of unliquidated damages) for delays in issuing Crown grants to the petitioner in accordance with a colonial Act. I think we ought to regard this decision as an authority which is entitled to our respect. This court is only bound by the judgments of the Court of Appeal, and the Privy Council, but we have always been accustomed to be guided, and I trust we shall always continue to be guided, by the decisions of the courts in England. It has been held by the Court of Queen's Bench in Blake v. The Midland Railway Company, 18 Q.B., p. 93, that decisions of the Scotch courts ought to be received as authority in Westminster Hall, if the law on which they turn be common to England and Scotland, and I think that this court ought to extend a similar comity to the Supreme Courts of the Australasian colonies, whenever it can be shown that the law which they are called upon to administer is the same as that which is in force here. Upon the whole, therefore, I am of opinion that the plaintiff is entitled to our judgment upon the demurrer with costs. We now come to the motion to enter judgment for the plaintiff, upon the findings of the jury.

The learned judge in summing up the evidence, submitted to the jury the following questions:—

1. Do you find that the lands or runs called Ludwig, Dura, and Kilmore, as described in the amended descriptions contained in the accepted tenders of J. L. Hay, are situated on the creek called Minerva or the creek called Sandhurst Creek? Answer: On Minerva Creek.

2. Did the Government, except as to small portions, refuse to lease those lands or runs to plaintiff? Answer: Yes.

2A. Did the Government except as to the small portions, grant leases of those lands to Messrs. Richards and Co.? Answer: Yes.

3. Was the plaintiff compelled to remove his sheep and stock depasturing on those lands at the request or by the direction of the Government? Answer: Stock removed by plaintiff on notice of Richards and Co., by reason of the action of the Government.

4. Did the plaintiff in December, 1867, accept leases of the lands, except as to small portions, comprised in the amended descriptions contained in the accepted tenders of J. L. Hay? Answer: No.

4A. Were the small portions a substantial part thereof? Answer: No.

5. Do you find that the allegations of facts [that the plaintiff waived any right he might have possessed in accepting the leases granted to him] contained in paragraph 16 of defendant's amended statement of defence are proved? Answer: No.

6. Assuming that the time of the refusal of the Government to grant leases to the plaintiff of the lands mentioned in question No. 1 be the point of time for the assessment of damages; what damages do you find for what he was wrongly dispossessed of? Answer: £12,000.

7. What amount of interest, if any? Answer: Interest from June, 1866, to April, 1877, at 5 per cent., £7,700.

8. Assuming that the plaintiff is entitled to receive the highest value for his interest in the lands between 1866 and the commencement of the actions, what damages do you find? Answer: £12,000 and interest as before.

9. Assuming that the refusal of the Government to grant the plaintiff leases of the lands mentioned in question No. 1 did not affect his leasehold interest in the

lands as licensee under the Orders in Council, wha damages is the plaintiff entitled to? Answer: Nominal damages, 1s.

A. Did the plaintiff in consequence of such lands having been granted by the Government to Richards and Co. remove from the said lands? Answer: Yes.

B. Did the Government concur in the dispossession of the plaintiff? Answer: Yes.

It was contended on the part of the plaintiff that on every point the facts had been found in favor of the plaintiff, and that the jury having found that the plaintiff was entitled to £19,700, he was entitled to have judgment entered for him for that amount. It was submitted, also, that under the Judicature Act these findings must be treated as conclusive. In my opinion, however, on a motion of this kind, the court is bound to look into the evidence and see how far that supports the verdict of the jury before they accept their findings as conclusive. On the great question at issue, to which the parol evidence was mainly directed, there is no longer any contest. It was admitted by the leading counsel for the defendant that the battle as to the *locus in quo* having been fairly fought, and decided in favor of the plaintiff, the finding of the jury in answer to the first question ought not to be disturbed. But he argued that, assuming that the Court should be of opinion that a statutory title was conferred upon the plaintiff, and that the leases were simply formal documents which might be withheld without affecting the plaintiff's title, the refusal of the Government to issue the leases to the plaintiff would only entitle him to nominal damages, no loss having been shown to be caused by a mere refusal. The finding of the jury in their answer to the ninth question was in accord with this argument, and as I have already intimated my opinion, that the plaintiff did obtain a statutory title to the leasehold of the runs, I think that nominal damages only can be awarded for the refusal to issue the leases to the plaintiff. The manner, however, in which the judgment should be finally entered, depends so much upon the effect which may be given to the arguments on the motion for a new trial that it seems desirable to proceed at once to that part of the case. The motion for a new trial was made on the following grounds:—1. Erroneous admission of evidence as to the measure of damages. 2. Misdirection by the Judge in not directing the jury as to the proper measure of damages. 3. Misdirection by an improper estimate of damages. 4. Misdirection, by directing the jury that they might give interest. 5. That the verdict was against the evidence. 6. That the damages were excessive. 7. That the damages ought to be reduced to the sum of 1s., or £2,500, or £12,000. The objection founded on the erroneous admission of evidence as to the measure of damages, cannot, I think, be sustained. The evidence given by the five witnesses called to support the plaintiff's case, went to show the mode in which the valuation of pastoral country was taken, at and about the time of the removal of the plaintiff from Minerva Station, and its effect was, that good sheep country such as Minerva Station in the Leichhardt district was estimated at so much per head for the number of sheep on the station, the market value per head being increased when the number of sheep was comparatively small for the capabilities of the run, and lowered when the run was more largely stocked. It would hardly have been contended that this evidence was inadmissible if the plaintiff had been deprived of his sheep as well as of his run, and it seems to me that the evidence was properly laid before the jury in order to assist them to form some estimate of the value of the run without the sheep. It was for them to form their own opinion under a proper direction from the judge as to the weight of such evidence. The learned judge directed the jury that the measure of damage was the loss which the plaintiff had sustained. This direction is scarcely sufficiently explicit (see Knight v. Egerton, 7 Ex., p. 407; Blake v. Midland Railway Co., 18 Q.B., p. 98). I think the learned judge should have told the jury that in assessing the damages they could not take into their consideration the value of the country as a "going concern"—to use the phrase employed by the learned counsel for the plaintiff—and that he should have

told them that the measure of damage occasioned by the compulsory removal of the plaintiff from the run was its value as a grazing country. The direction of the learned judge in telling the jury that they might give interest on the amount of the damages awarded, appears to me to have been erroneous. The amount sought to be recovered as damages was an unliquidated sum, and no authority was cited, or as far as I know could be cited, to show that in a case of breach of contract, interest can be allowed by a jury by way of enhancing the damages, unless the amount for which the action is brought be an ascertained sum, and payable either by mercantile usage or by an express agreement to pay interest. It was contended by the counsel for the plaintiff that the sum of £7,700 which had been given by the jury was not to be looked upon strictly as interest, but as compensation for loss of profits suffered by the plaintiff. This argument, which was used on the motion to enter up judgment for the plaintiff, is answered, first, by the finding of the jury in answer to the seventh question submitted to them by the learned judge, awarding the amount as *interest*; and, secondly, by the decision in the British Columbia, &c., Co. v. Nettleship, Law Rep., 3 Com. P., p. 499. The objection that the verdict was against the evidence was directed only to that portion of it which related to the alleged concurrence of the Government in the removal of the plaintiff from Minerva station. In the presence of the documentary evidence supplied by the plaintiff's memorial of the 9th of April, 1866, and the reply of the Under-Secretary for Lands, dated the 14th day of May following, this objection cannot for a moment be entertained. From what I have already said it may be collected that I think the damages awarded by the jury were excessive, and should be reduced by the amount of £7,700 given as interest, and as the true principle upon which the measure of damages should be calculated has not been laid before the jury, I think a new trial should be granted for the purpose of re-assessing the damages, but for that purpose only. Pending the result of that inquiry the judgment of the Court in reference to the motion to enter up judgment must be suspended.

Lilley, J.:—The questions raised on the demurrer are substantially these:—1st. Was there a sufficient contract binding upon the Crown? 2nd. Was there a breach of the contract entitling the plaintiff to a remedy from the Crown under the Act 20 Vic., No. 15? 3rd. Can the plaintiff recover unliquidated damages? As to the contract, it may be taken to be clear that there must be a contract which would be binding upon a subject of the Crown under like circumstances. It may be taken to be common learning and matter of every day experience that there is not any common law prohibition of a contract between the Crown and anyone of its subjects, but the contracts in respect of the waste lands of the colony have always been the subject of express enactments, or Orders in Council, without, I think, excluding common law incidents not inconsistent with the express written law relating to such engagements. The plaintiff derives his title from James Leith Hay, and there can be no doubt that on the 17th July, 1861, when Hay's tender was accepted, there was completed, as between Hay and the Crown, a series of transactions which, as between subject and subject of Her Majesty, would have created a binding contract. I think it had the same effect as between Hay and the Crown. Hay had tendered in 1858-1859 for the runs then called "Ludwig," "Dura," and "Kilmore," within the unsettled district. The law, as it then stood, was concisely this:—All the Imperial Acts in force respecting the disposal of the waste lands of the colony had been repealed by the Constitution Act 18 and 19 Vic., cap. 56; but the Orders in Council, made under the authority of the repealed statutes were kept in force (sec. 4), and all regulations made under the same authority and legally in force were to remain so until the Legislature of the colony should otherwise provide. The principal Order in Council, then in force, was that of the 9th March, 1847, by which the lands were divided into districts

called, respectively, the settled, intermediate, and unsettled districts. Section 13 of this instrument (including sec. 12 by reference) contained the law relating to tenders for runs within the unsettled districts, and it was under that order that Hay's tender was received by the Government of New South Wales. Before it was accepted, however, Queensland, which had theretofore been a portion of New South Wales, had become a separate colony, and our Legislature had passed in its first session a series of Acts relating to the waste lands of the Crown. One of those Acts, 24 Vic., No. 12, "The Tenders for Crown Lands Act," was passed on the 17th September, 1860. The Order in Council of 9th March, 1847, was repealed, except as to matters then lawfully done or "commenced or contracted to be done" (sec. 1,) and persons whose tenders for runs had been "already received and opened" under the 12th and 13th secs. of the Order in Council, "and of which such persons shall be entitled to a lease under the said 12th section" were required to pay rent, but not more than one year's rent, for each run "till the said tenders shall have been accepted and reported on" (sec. 2). The Act contained a proviso for return of rent should the tender under certain circumstances be ultimately declined. There is nothing in this Act that seems to me to confer a more extensive or different right on the tenderer than he had acquired under the Order in Council; that is a right to a lease within the conditions imposed by the statute, which in some particulars modified the Order in Council. On the 17th July, 1861, Hay's tender was accordingly accepted. I think as between the Crown and Hay, there was then a complete binding contract unless he had done anything to forfeit his right, or disentitle him to performance by the Government. The 12th and 13th secs. of the Order in Council clearly give power to create by contract the relation of landlord and tenant between the person tendering and the Crown on accepting the tender; and the statute seems to me merely to confirm that position, and to entitle the person to fulfilment by the grant of a lease. The proviso to sec. 1 of "The Tenders for Leases Act" calls it a thing "contracted" to be done: by sec. 2 the rent is to be paid "until such lease shall have been granted," by sec. 2 the "term of every such lease shall commence from the 1st day of January or July nearest to the acceptance of any such tender;" and there is nothing in the Act to bind the Government until the acceptance of the tender which was entirely at their option. They were then bound to grant a lease (sec. 3.) The system of tendering was prescribed for convenience, and for the purpose of determining by competition the amount of premium, and the person entitled to the lease (sec 12, Order in Council). But the lease was, I think, the actual title, and not merely evidence of it. I can only read the Act as an authority to dispose of the Crown lands by demise. Such was Hay's position on the 17th July, 1861, unless his transfer of his "right, title, and interest" to the plaintiff on the 2nd April, 1861, caused a forfeiture. That transfer was made with the sanction of the Government, duly notified in the *Government Gazette*, and by letter to the plaintiff on the 23rd July, 1861. The Orders in Council and regulations contain no prohibition of such a transfer of right. On the contrary, the regulation of 1st March, 1851 (p. 57, of the Laws and Regulations relating to the Waste Lands, published in 1858) expressly provides for transfers of leases; and when the contract for the lease had been completed with the Government upon the equitable doctrine that things agreed to be done are to be regarded as done, and in the exercise of the ordinary right to alienate or transfer property either in present possession or of future acquisition, I think the transfer was binding on Hay. Probably the Government might have refused the plaintiff as a tenant (sec. 12 of the Order), but they gave effect to the transfer, permitted him to occupy and perform conditions, and received the rent from him. Whether we regard the transaction as a substitution of one contractor for another, or as a novation of contract, I see no valid legal objection to the plaintiff's title. It is not one of the causes

of forfeiture mentioned in sec. 14 of the Order in Council, and there is no restraint of such a transfer in the Tenders Act. There was, therefore, a contract by the Crown with the plaintiff.

As to the alleged breach of contract and the plaintiff's right to a remedy under the Act: The statement of claim in pars. 15, 16, 17, 18, and 19, gives the particulars of the alleged breach of contract, namely, the refusal to grant leases to the plaintiff, the grant of leases to Richards and Co., the eviction of the plaintiff by them, and the concurrence of the Government in such eviction. In the case of a contract between subject and subject, the facts alleged would constitute a clear breach of contract. There being no allegation of fraud by Richards and Co. in obtaining their leases, the plaintiff's right was not available against them either at law or in equity. The Crown, moreover, has always maintained that those leases were rightly issued, and that the runs included in them formed no part of the country to which the plaintiff was entitled to have leases. The plaintiff was unable, therefore, to defend his possession as against Richards and Co.'s leases, either at law or in equity. Nor was he bound to attempt it. In contracts with the Crown, as with the subject, there must be reciprocity of obligation; and on the part of the Crown, the lease or demise, or the contract for it, must imply a covenant, undertaking, or promise for quiet possession against any act of the Crown, or its agents on its behalf. The argument that the plaintiff could have defended his possessions by force of the Tenders Act alone is, I think, untenable; the leases being the foundation of the title, and those having been granted to others. I think these were more substantial than "mere pieces of paper," containing only evidence of a statutory title, and that the issue of them was more than a breach of a mere duty. It was the creation of a title adverse and paramount to that of the plaintiff, and an eviction. It is contended, however, that if it be a breach it is a tort, and the Crown is not liable to be sued for it. In some sense every breach of contract is a tort, but the line between pure tort and wrongs arising from contract is sufficiently marked. The neglect or refusal to perform a contract, or an act opposed to its performance, is not a pure tort, of which latter the Crown is considered to be incapable. There is a breach of contract in this case for which the Crown is liable, and it remains to be considered whether the Act 20 Vic., No. 15, gives the plaintiff a remedy. I see nothing in the Act to confine the right of the subject to a recovery of lands or something *in specie* or compensation for their loss. Nothing, in fact, to deprive him of a right to compensation in damages. Some rules of the judges in New South Wales have been referred to, based, seemingly, on an opposite assumption. The Act, however, gives them power to make rules "for the regulation of the pleadings, practice, or proceedings, on any such petition," (sec. 8) and not to restrict the right of the suitor. By sec. 6 the Governor in Council is empowered to "satisfy and pay any judgment or decree recovered by any such petitioner," and there is no provision for a re-delivery of lands or goods; the judgment in such last-mentioned cases would be, no doubt, *amoveas manus*, which would at once dispossess the Crown. It would seem, therefore, that the statute provides a remedy for the plaintiff, the preamble showing that the Act is intended to apply to disputes and differences in which the ordinary remedy or procedure by petition of right is insufficient. I do not, however, think the statute confers any new right upon the subject, or imposes any new liability on the Crown, beyond a more convenient remedy for rights within the existing law. Whether unliquidated damages can be recovered against the Government, is, I think, determined in the affirmative by the case of Thomas v. The Queen, 10 L.R. Q.B., 31, cited on the argument.

The plaintiff's motion for judgment will be more conveniently determined by considering first:— *The defendant's motion for a new trial, or for reduction of damages.* The rule was moved on five grounds:—

1. Erroneous admission of evidence as to the measure of damages.
2. Misdirection by the Judge as to the same.
3. That the verdict was against the evidence, as there was no eviction.
4. That the damages were excessive.
5. That the damages should be reduced.

The result of my judgment on the demurrer, is to determine the third ground for the plaintiff, as the facts proved sustained the claim, and justified the verdict. I have, therefore, to consider only the nature of the damages recoverable by the plaintiff; whether there was a misdirection as to the true measure of damages, and whether these have been correctly assessed. It is said that there is not any known arbitary rule of damage, and it is conceded that there is no decided case in these colonies to guide us to a conclusion. The plaintiff claims the market value of the "runs"—that is, the land to be leased—and sheep as if they had been sold together, less the value of the sheep alone, as he removed them and did not sell them. The Crown says he is entitled only to the value of the unexpired residue of the term of fourteen years' lease of the country for "pastoral purposes," without the alleged loss of profit on the sheep and runs as if sold together. The runs were to be leased for "pastoral purposes," but the pastoral tenants used to buy and sell and transfer their runs, in which transactions the price to be paid for the leasehold and stock was regulated at so much per head of the number of sheep or cattle on the runs. The plaintiff had 12,000 sheep, and the jury appear to have assessed the value of the runs with the sheep on them at 30s. per head, and deducting 10s. per head for the market value of the sheep alone, to have assessed the plaintiff's loss at 20s. per head, as if he had lost a sale of the sheep and country combined as one subject matter of sale. The precise figures are immaterial; it is doubtless on such a basis the jury have given the plaintiff the damages of £12,000. It may be shortly stated thus: The runs and 12,000 sheep, valued together at the market value of 30s. per head, were equal to £18,000, less the market value of the sheep alone at 10s. per head, which is £6,000, leaves £12,000 the plaintiff's assumed loss. There is evidence that the runs alone for grazing or pastoral purposes, without the sheep on them, would be worth from £2,000 to £2,500, and not £12,000. The claim of the plaintiff would seem, therefore, to be for something in the nature of loss of the "good-will" or loss of profit, or of a premium for going out of the leasehold. Any purchaser coming in must have immediately sold the sheep in the ordinary way of business at 10s., and not at 30s. per head. The 20s. per head, therefore, given as loss is the purely speculative value of the business, including the unexpired residue of the term of the lease. In ordinary business it would find its equivalent in a transaction of this kind—viz., leasehold premises, £2,500; stock-in-trade, £6,000; good-will, £9,500, equal £18,000; but I take with me my stock-in-trade (£6,000) when you evict me, leaving the balance as damage, £12,000. No case has been cited to show that a landlord evicting a tenant would be liable for the speculative loss of good-will, premium, or business profits. Locke v. Furze, cited for plaintiff, does not establish such a claim. The case of Spedding v. Nevell, L.R., 4 C.P., 212, not cited yet, shows that this kind of damage is altogether too speculative and remote, and cannot be recovered against a landlord on a breach of contract for a lease. The only rule of damage that seems applicable to a case of this kind between a subject and the Crown would be that the plaintiff should have compensation for his real or actual loss, having regard to the precise nature and extent of his possession and enjoyment included in the residue of the term. It is, in fact, a mere grazing right for the residue of the term of fourteen years, namely, nine years at the utmost. There is no evidence that the plaintiff lost any of the market value of the sheep if sold in the ordinary way of business in consequence of the removal to Fernlees, and the plaintiff says he would not have sold the sheep and runs at 40s. per herd. His claim, therefore, is for profit or premium, which he might possibly have got if he had

been able and willing to sell the runs and sheep together. Speculative sales and purchases of runs can scarcely be called "pastoral purposes," for which the leasehold term was to be created. It was against the mere traffic in runs that the Crown Lands Act of 1860,—viz., the "Tenders for Runs Act," the Unoccupied Crown Lands Occupation Act," and the "Leasing Act"—were directed, and occupation and stocking with a proportion of sheep or cattle were required. All who know the history of the time, and the policy of the Acts, and the evil they were intended to remedy, know this. Reverting, however, to the rule or principle on which I think the plaintiff's damage should have been ascertained, differing as it does altogether from that submitted to the jury, it follows that there has been an improper assessment of damages. We have not with us either the learned judge who tried the case, or any complete note of his summing or direction to the jury, beyond the questions submitted to them. I must, therefore, speak with some degree of hesitation as to his charge. It appears, however, not to be disputed that he said to the jury, "The measure is the loss he sustained, and the plaintiff says his loss is the value of the runs less the value of the sheep." The judge declined to put any question as to the value of the residue of the term without the sheep, and no question was put to the jury as to the value of the runs. The effect of all this seems to me to have been to misdirect the jury, and to tell them that the plaintiff's claim was the correct measure of damage. It is enough, however, to decide that the jury have proceeded on a wrong basis and given an erroneous finding. In addition to what I have indicated as the proper direction on the rule or measure of damage in this case the jury should have had the state of the law explained to them as to the nature and extent of the plaintiff's tenure. Could the plaintiff and the Government, or either of them, have contemplated as part of their contract a liability to compensate for a speculative loss such as the plaintiff claims? Under the Order in Council (9th March, 1847) the tenure was for fourteen years for "pastoral purposes," but this limited user had an engrafted "permission" for the lessee "to cultivate so much of the land as may be necessary to provide grain, hay, vegetables, or fruit, for the use and supply of the family and establishment of such lessee." (Cap. 2, sec. 1.) And under sec. 9, cap. 2. there was a practically unlimited power of resumption *by way of grant or sale* for facilitating the improvement and settlement of the colony. This power of resumption was not restricted by the "Tenders Act" and "Unoccupied Crown Lands Occupation Act," except that the lessee was entitled to notice. In the latter Act, sec. 16, the 9th section of the Order in Council is almost entirely re-enacted, and under sec. 17 of the Act an unlimited power of resumption is reserved to the Crown—"The whole or any portion of any run may be reserved for public purposes or *resumed for sale or otherwise* after giving twelve months' notice." The compensation to the lessee is prescribed by sections 17 and 18—on resumption. He was entitled to twelve months' occupation before resumption or reservation of his runs when he had received notice. The leases to Richards and Co., with notice by the Government to the plaintiff that the leases had been issued, constituted a resumption. The plaintiff should have been allowed twelve months' occupation after that notice, but he was evicted, and the extent of his damage by way of loss for the unexpired residue of his term would seem not to exceed the value of this twelve months' occupation. This point has not been raised or argued, but it can be discussed after the re-assessment of damages, which, I think, should be made. These topics, showing the uncertainty of the plaintiff's tenure, should have been placed clearly and explicitly before the jury by the learned judge, and they must be so upon a re-assessment of the damages, looking to the term as a possible residue of nine years, or any other lesser number of years, not less than one year. The value of the one year's occupation should also be ascertained, and until these re-assessments have taken place, the motion for judgment should be postponed. The case for

the Crown on the damages seems to me never to have been submitted to the jury by the learned judge. The questions for the jury should be substantially- 1st. What was the value of the unexpired residue of the term without the sheep? That may be the annual rental the plaintiff could have obtained capitalised for the whole residue of the term, and the rent payable by the plaintiff to the Crown must be deducted. 2nd. What was the value of the one year's possession after notice of the leases to Richards and Co. by the Government? The plaintiff's rent to the Crown must be deducted. There may be other practical ways of ascertaining the value on either of these questions which I have adapted to the facts proved in this case. No claim has been made for loss by stocking in the proportion required by the statute, nor do I think it could be successfully claimed. The policy and object of requiring occupation with stock was to prevent what was known as "run hunting" and "speculation in unoccupied runs," and the keeping of vast areas of our public lands in the condition of uninhabited wilderness. It must be regarded as an addition to the rent or obligations of the tenants given for obtaining the term. The plaintiff may claim to have questions submitted to the jury on the measure of damage he claims. I see no objection to that course if he wishes to persist in his claim. It may put the case into a form for final decision. It is much to be regretted that this was not conceded to the Crown on the trial which has already been taken. The cost of a re-assessment would have been saved. As to the sum of £7,700 allowed for interest, *as interest*, it is unsupported either by common law, statute law, mercantile usage, or agreement between the parties. It is not claimed in the plaintiff's statement of claim, and his counsel abandoned the contention that they could recover it as interest. They did, however, attempt to sustain it "as an allowable mode of estimating damages for a breach of contract, as damages for loss of profits," and "as compensation for being deprived of the money or property all that time." It seems to have been claimed almost at the last minute, when the judge was summing up; and thereupon he left it to the jury with this observation: "For my own part I don't see why a plaintiff, who is deprived of property of this kind, should not recover interest, but I leave it to you; assess it separately," which they did. It is not recoverable as interest, and the jury did not assess it as loss of profits. It never occurred to anybody to deal with it as profit. I have already given my reasons for holding that the jury could not do so. Moreover, the delay was the plaintiff's own, and the £12,000 included the whole possible damage either for loss of profits or otherwise. If the plaintiff were allowed to recover in the name of profits the £7,700 illegally assessed as interest, he would recover in great part double damage. I have not thought it necessary to deliver a detailed review of the cases cited on the argument. I reserve that, if necessary. In the main my judgment rests on principles and analogies to be found in them. I have refrained from any comment on the decision of the Court in the former case of Macdonald v. Tully, as I was leading counsel for the plaintiff on that occasion, without, however, having advised either for or against the institution of the action. As the Court is composed, and as the law stands, I am compelled to give judgment. Wherein it differs from the former decision of the Court, I wish to say I give it with the greatest respect for the learned judges who formed the bench on that occasion. In my opinion, our judgment should be for the plaintiff on the demurrer, with his costs; that the motion for judgment should be postponed, and that the defendant's motion for a new trial should be made absolute for a re-assessment of damages, and that all other questions of costs should be reserved until the further hearing of the motion for judgment. The judgment of the Court will, therefore, follow this decision.

Attorneys for the plaintiff, *Murphy & Paterson.*

Attorney for the defendant, *The Crown Solicitor.*

Sept. 11th, 1879.

MACDONALD *v.* TULLY.

Venue—Change of.

The venue of a case will not be changed unless there are sufficient facts to satisfy the Court that a fair and impartial trial could not be had at the original place of venue.

The *Attorney-General, Pring, Q.C.*, and *Garrick*, moved for a rule to change the venue in this case.

Griffith, Q.C., and *Real*, showed cause against the rule.

LILLEY, C.J.:—In this case, it must appear to the satisfaction of the Court, not that the defendant fears that a fair and impartial trial cannot be had, but there must be some sufficient facts to satisfy the Court that a fair and impartial trial cannot be had at Rockhampton. I confess that I have a better opinion of the Rockhampton jurors than to believe that they will be led by this highly spiced and somewhat inflammable article against the case for the Crown. The question to be tried is a very simple matter, merely an assessment of damages. There will be no doubt evidence both on the part of the plaintiff, and of the defendant, and if the jury should make an assessment not within the evidence laid before them, it will be quite competent for the Court then to order the trial to be held elsewhere. But I do not think there is reason to suppose that the jury will do anything of the sort. I think, therefore, that the rule should not be made absolute.

LUTWYCHE, J.:—I am of the same opinion. As I observed in the course of the argument, the case has been tried twice. In both cases the juries followed the direction of the judge, and I am not satisfied by any evidence that has been produced before the Court that there is no hope of obtaining a fair and impartial trial. On the contrary, I think there is good ground for believing that the jury will try it fairly and impartially. We learn from an affidavit filed on behalf of the plaintiff, that of Mr. Murphy, that it is highly probable that fresh witnesses will be examined in addition to the witnesses who were called to support the plaintiff's case on the last trial, and I think it would be going a great way to assume that the jury would absolutely make up their minds to return a verdict unfavorable to the Crown. The rule will therefore be discharged.

Rule discharged, without costs.

Attorneys for the defendant, *Little, Browne and Ruthning.*

Attorneys for the plaintiff, *Murphy and Paterson.*

Sept. 12th, 1879.

Re THE PUBLISHER OF THE 'NORTHERN ARGUS' NEWSPAPER.

An action having been tried at *nisi prius*, and a verdict having been given for the defendant on motion for judgment, the case was referred back to a jury for re-assessment of damages. Before the second trial, an article was published in a newspaper reflecting upon the decision of the judges in referring the case back. The publisher of the newspaper was punished for contempt of court.

THE action of Macdonald *v.* Tully was tried by a jury at the Assizes of the Rockhampton Circuit Court, and a verdict was given for the plaintiff. On motion for judgment, the case was referred back to a jury for re-assessment of the damages. Shortly afterwards, and before the hearing of the new trial, the defendant published an article in his newspaper reflecting upon the decision of the judges, and suggesting that it was influenced by improper and corrupt motives.

The *Attorney-General, R. Pring, Q.C., Garrick* with him, moved absolute a rule calling upon the defendant to show cause why he should not be punished for contempt of court.

Griffith, Q.C., showed cause.

LILLEY, C.J.:—In the matter of the rule calling upon the proprietor and editor of the *Northern Argus* to show cause why he should not be attached for contempt or otherwise dealt with as the Court should think fit, I have now to deliver my judgment. The law gives authority to the Court to prevent its proceedings being rendered powerless and suitors being deprived of the benefit of an impartial administration of justice. The respondent will be punished for his attempt to succeed—but fortunately I believe, not for his success in

preventing the due administration of justice. Individually I should be disposed to pass over the offence as one of very little consequence, if I could see that no further mischief was likely to arise from writings of this kind being repeated, but I have a duty to perform, and that is to maintain—and more especially among persons whose minds may be biassed by writings of this kind—the fullest possible respect for those who administer the law within the colony. The writer of the article complained of has said that he was not aware that the matter was still under the consideration of the Court, but thought it had passed to a final stage within the colony. I regret I cannot say that I fully believe that statement, because the article itself contains internal evidence of the strongest kind that he knew that the matter had been referred to the decision of another jury. There can be no doubt whatever, at all events, there is no doubt in my mind, that the article was expressly written, and most carefully compiled, and it bears evidence of the most careful research with the view of directing the minds of the jury in opposition to the possible direction of the judge who may preside at the trial. It was designed, I think, and no reasonable man can doubt it after reading the article, to influence the jury to resist the authority of the judge, to lead them, in fact, to assume the functions of the judge, and refuse to perform their duty as jurors properly within the lines of the law. It would have been enough if a simple direction to that effect had been given to the jury, but when it is combined with language attributing to the judges a corrupt administration of justice, the article becomes more serious in its character. The administration of the law—the judges who delivered the judgment of the Court in Macdonald *v.* Tully—are charged with this, that having decided that the plaintiff had a right, they deliberately, in order to deprive him of the fruits of their judgment upon that right, referred the case to the jury for re-assessment of damages, and in that respect—for such must be the inference—going against their own conviction that he was entitled to the damages awarded by the jury. They are in fact charged with corruption in the administration of justice, and that they were influenced in their conduct by some political bias or motive. I might have said that so far as the Court is concerned we might very well leave our administration of justice to the opinion and sense of propriety and judgment of our fellow-colonists, and it is only from a consideration of the possible consequences which might result from a repetition of such conduct amongst those who are not so well instructed, that it is necessary to visit this offence with some punishment which must be of a severe character. It would be, I think, a grave scandal if judges were to be called upon to enter into the public press to defend their judgments, motives, and characters against anonymous writers. No one would be less disposed to interfere with the just influence of the press than I am. Large privileges have necessarily been conceded to it from its great general public usefulness, but if that indulgence—for it is nothing else, is to pass into absolute license, and our fellow-colonists are publicly told that no confidence can be placed in the judges who are moved by corrupt motives—for that is the effect of the article—that license may become a serious evil, and our administration of justice would be intolerable because ineffectual. The punishment inflicted upon this defendant will not be dictated by any feeling on the part of the Court. The defendant has a right to complain. Whether it is a matter between the public or private individuals makes no difference; there is not one rule of law and justice for a private individual, and another for the government. We must regard this as an offence against Mr. Tully, who has certain great interests in his hands. I think myself that the defendant should be fined. We will not go the extent of sending him to prison on this occasion—what punishment a repetition may provoke I do not think it is necessary to say. He has given no assurance that it will not be repeated, but if he does, it will be dealt with when the time arrives. I think the punishment should be £50, with the costs of the proceedings.

LUTWYCHE, J. :—I am of the same opinion, and under ordinary circumstances after having heard the judgment of the learned Chief Justice and the views pronounced by him, it would be sufficient for me to record my assent, but occupying the position that I do, I consider that it is incumbent upon me to give some additional reasons for my judgment. I wish it to be distinctly understood that in dealing with this case, I am not in the slightest degree influenced by the abusive terms which the editor of the *Argus* has thought proper to apply to the judges. Remarks of this kind so far as the judges themselves are concerned might well be allowed to pass, but it is in connection with the wrong done to the defendant in the action that I look at the observations directed against the judges. I cannot do better than cite the opinions and languages of Lord Erskine, in *Ex parte* Jones (13 Vesey, 238), as expressed by his judgment in a similar matter. The Lord Chancellor said :—"It never has been or can be denied that a publication not only with an obvious tendency, but with the design to obstruct the ordinary course of justice, is a very high contempt." And in speaking of the case which he had under consideration he says:—"The object of the writer is, by defaming the proceedings of the court, to procure a different species of judgment from that which would be administered in the ordinary course, and by flattering the judge, to taint the source of justice." In this case, the person now supposed to be personally before the court, but in reality upon whose conduct we have to pass our judgment, has not flattered the judges, but has endeavoured to obtain the same end by abusing them and so to pervert the ends of justice and wrong the defendant by inducing the future jury to disregard the direction of the judge, and to mulct the colony in damages which the State would not fairly be called upon to pay. That is clearly the intention of the editor of this publication, and that being so, it only remains to consider what punishment should be inflicted upon him. I agree with the measure of punishment which the Chief Justice thinks should be awarded, and in coming to that conclusion, I am much influenced by the insufficient excuse which the affidavit of Mr. Bourcicault has presented to the court. I fail to see in that affidavit anything like a proper expression of contrition. I see an evident desire to shirk an apology as much as possible, and on that ground he ought to be made to pay a fine—which will be a sufficient warning to him and others to prevent a repetition of an offence of this kind.

HARDING, J. :—This case arises on the publication of an article in a Rockhampton paper. It raises two breaches of the rules of this court. The first impugns the purity of the court and of the judges administering justice in this court, and secondly, it so argues a state of facts or supposed facts as to attempt to prevent a fair and impartial trial on a re-assessment of damages which has been ordered by this court. As to the first, the imputation on the court, the writer of the article starts with the assertion "We deferred making any comment upon the judgment pronounced by the Supreme Court on the 15th July instant, in the case of P. F. Macdonald *v.* Tully, until the arrival of certain information. As that information is now to hand we shall endeavor to show that the judgment pronounced by His Honor Mr. Chief Justice Lilley, and His Honor Mr. Justice Lutwyche, were not in accordance with opinions held and expressed by either gentleman when the case first came on for hearing in Rockhampton in September 1869." That is an endeavor to show that their Honors are not acting in accordance with some opinions formerly expressed by them, and further on the writer says he will show they have "from some unaccountable cause changed their opinions." I have endeavored to discover that "unaccountable cause," and I think I have come upon it in the last paragraph. "It is a melancholy subject for consideration that if a Queenslander requires justice at the hands of the Queensland Government, he should be compelled to appeal to the mother country; it is a sad thing for us all, that law and politics are here twin brothers and go hand-in-hand." So that I take it, one of the grave imputations there is, that we have political judges, and that when a government case comes on

for consideration the people of the colony cannot obtain justice here. I think this article is written with the view of inducing the jurors to discredit those judges and to discredit the judge who would direct them as to the law on the re-assessment of damages. A man is presumed to know the law, and it has been laid down both in England and America, that the only case where that presumption does not hold is where he is a juryman in the box, there he is presumed to be ignorant of all law and he must take it from the judge on the bench. If that be a correct definition of the duty of a juryman, what does this article state with reference to the jury who are going to try this case. It tells them to discredit the law which the judge shall give them. That is a grievous dereliction of duty on the part of the press, and in my judgment if the action required it deserves punishment, and no light punishment either. But their Honors have in this case, with the dignity which they uphold and have upheld in this colony for so many years, said that they pass it over, consequently I pass it over also, and do not allow it to influence the judgment I have arrived at. But at the same time, I think, the defendant in the case, whether it be Mr. Tully or the Government, is entitled to have it borne in mind in considering the amount of injury which the writer has done or may do him in his litigation. With regard to the second breach of the rules of this court, namely, that this article tempts to prejudice the fair trial of the question, I agree with their Honors, and so far as they have criticised the article, I think it is unnecessary to say anything, but I think I can adopt the observations made in the case of *Ex parte* Hovell (8 N.S.W. Reports, 356), by Mr. Justice Hardgrave. He characterized the article there complained of as a "most abominable one," and that is my opinion of this article. I think the writer of it should be punished severly. There is a mode by which the writer of such an article or a party committing a contempt purges it or lessens the punishment which he should receive for that contempt. The Chancellor, in Lechmere Charlton's case, reported in 2 M. & C., 316, at page 356, says:—"The court will not discharge a party guilty of contempt unless he submits. I do not say the imprisonment is to be perpetual, or that the court will not exercise a sound discretion, but a party who comes here to be discharged from custody, at the earliest possible period at which he could be so discharged." I take it that the respondent is adjudged guilty of a contempt, but whether he be in prison or at the bar asking to purge that contempt is immaterial, and that these observations are as applicable as in that case. The Chancellor proceeds, "is at least expected to come before the court with an expression of repentance for what has passed and that sort of statement which will induce the court to hope such an offence will not be repeated by him and will justify the court in acting with lenity towards the individual and prevent the jurisdiction of the court being subject to similar offences in the future." In this case he is not in custody. So also in the case in New South Wales, and I take it that a party asking mercy, should admit that he had committed an offence. I have listened, and I do not find in this case up to the present, any admission by the respondent of his having done any wrong. I do not find any promise that he will not do wrong in the future. His apology is limited to his sorrow that he did not wait till he could attack this court and the defendant's case with safety; but in my judgment he can never do it with safety. I think that the expression of repentance he has made has not been sufficient, and that being the case, I consider he should be fined, and that a fine will be sufficient to satisfy the justice of the case. I agree with His Honor The Chief Justice, that a fine of £50 will be sufficient, and that he be ordered to pay the costs of this application.

Attorneys for the plaintiff, *Little, Browne and Ruthning.*

Attorney for the defendant, *Mein.*

November 5th, 1879.

CRIBB *v.* PINNOCK & OTHERS.

Municipality— By-law—Ultra vires—Public street, footpath—28 Vic., No. 21, secs. 70, 75.

A municipal by-law provided that the municipal council might cause a notice to be served upon any landlord or owner of any shop warehouse dwelling building or ground fronting any street or thoroughfare in the municipality of Brisbane to pave the footpath in front of such shop warehouse dwelling building or ground and That every such footpath should be paved with such materials and in such time and in such manner as should be directed by such notice and that every landlord or owner who should neglect or refuse to comply with the notice as aforesaid should for every such offence, be liable to a penalty not exceeding £10.

Held, that the by-law was not *ultra vires*.

The Attorney-General, (Pring, Q.C., Swanwick, with him,) moved absolute a rule, calling upon the corporation and mayor of the municipality of Brisbane and certain justices for the colony, to show cause why a writ of prohibition should not be issued prohibiting them from proceeding upon an order made by the justices on the 19th of September, 1879, in a matter in which the Corporation was complainant, and the plaintiff was defendant.

The order of the 19th September, was obtained under the following circumstances:—

On the 2nd September, 1879, the General Inspector for the Municipality laid an information against the plaintiff, for the purpose of enforcing by-law No. 23 of the Municipality, in respect of an alleged breach thereof by Mr. Cribb, who was the landlord or owner of certain buildings and ground in Elizabeth-street, in the Municipality, in neglecting to comply with a notice served on him by the Municipal Council to pave the footpaths in front of the said buildings and ground. The material parts of the by-law were as follows:—

> "Whereas it is expedient that the footpaths of the streets and thoroughfares within the City of Brisbane, should be paved. It is therefore ordered by the Council of the Municipality of Brisbane by virtue of the powers and authorities in them vested by *The Municipal Institutions Act of 1874* and authority of the same as follows:—
>
> 1. That the Council may cause a notice to be served upon any landlord or owner of any shop warehouse dwelling building or ground fronting any street or thoroughfare in the said Municipality to pave the footpath in front of such shop warehouse dwelling building or ground.
> 2. Every such footpath shall be paved with such materials and in such time and in such manner as shall be directed by such notice as aforesaid and every contractor mason or other person employed in paving any such footpath who shall for such purpose use any inferior or different materials shall for every such offence be liable to a penalty not exceeding ten pounds (£10).
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> 4. Every such landlord or owner who neglects or refuses to comply with the notice as aforesaid shall for every such offence be liable to a penalty not exceeding ten pounds (£10).
> 5. The word "pave" shall include the word "kerb" except when otherwise expressed in any such notice and the words "landlord" or "owner" shall include corporations or companies.

Griffith, Q.C., (Real with him,) showed cause against the rule.

The Chief Justice left the bench before the hearing, he being a ratepayer and property owner in the Municipality.

Lutwyche, J.:—In this case, although the arguments have occupied some considerable time, the real question seems to be within a very narrow compass. The learned Attorney-General reduced it to a very small compass indeed, because he went the length of admitting that the Corporation had the power to make the by-law in question, so far as to enable them to require the pavement of a footpath in front of an owner's premises to be in accordance with a plan prescribed by themselves, if the owner chose to undertake the work voluntarily. But he said the Act has not given the Corporation power to enforce such a thing by

a penalty. Now there I disagree with him. I think, looking at the 75th section alone, that the Corporation is given power to make a by-law such as that which has been called in question. That section imposes upon the Council "the care, construction, and management of roads, public streets, bridges," and so forth, and also of "public thoroughfares," and "may make by-laws for carrying out these objects." It seems to me, upon a proper construction of that clause, that one of the objects which it imposes is the construction of public streets. It is not disputed—in fact it is contended—that a footpath is part of a public street; of that there can be no question after the authorities which have been cited in the course of the argument. But the contention of the learned Attorney-General was that, because the Legislature imposes upon the Corporation the "care, construction, and management" of public streets, they require them to undertake the construction themselves, leaving out what appears to me to be an essential, certainly a most important, part of the clause—namely, the discretionary power which allows them to "make by-laws for carrying out these objects." I take it, if a man is empowered to construct, he is empowered to cause to be constructed; and the necessary means for carrying out that object seems to me to have been placed at the disposal of the Corporation by the words of this 75th section. Taking that section as it stands, without calling in the aid of section 70, which is more specific, I think it is quite enough to show that the Corporation legally exercised the power imposed upon it in making the by-law which has been objected to. It is not the duty of the court to express any opinion as to the policy of this Act. Possibly a better mode might have been devised for effectuating the pavement of by-paths than that which the Act authorises and the council have carried out. We have nothing to do with that. The question is, have they the power to do what they have done? I think under the 75th section they have the power. Then we come to the 70th section. Under that they are empowered to make by-laws for the "alignment, kerbing, paving, and guttering of streets." No words could be more precise. They may require that to be done by the owners or occupiers of property abutting upon the street. They seem to me to have absolute power, and all their acts have been good and perfect. I think this rule ought to be discharged.

HARDING, J.:—The question in this case arises upon an order *nisi* obtained by Mr. Swanwick, as counsel for Mr. Cribb, on the 26th of September last, from his Honor the Chief Justice, calling upon the Corporation and Mayor of the Municipality of Brisbane, and certain justices for this colony (the Police Magistrate for Brisbane being one), to show cause before this Court, why a writ of prohibition should not be issued prohibiting them from proceeding upon an order made by the said justices on the 19th of September, 1879, in a matter wherein the said Corporation was complainant, and the said Mr. Cribb was defendant.

The said order of the 19th September last, was obtained under the following circumstances:—

On the 2nd of September, 1879, the General Inspector for the said Municipality, laid an information against Mr. Cribb, for the purpose of enforcing by-law No. 28 of the said Municipality, in respect of an alleged breach thereof by Mr. Cribb, who is the landlord or owner of certain buildings and ground in Elizabeth-street, in the said Municipality, in neglecting to comply with a notice served on him by the said Municipal Council, to pave the footpath in front of the said buildings and ground.

The by-law so far as it is necessary for me to refer to is as follows:—

"Whereas it is expedient that the footpaths of the streets and thoroughfares within the City of Brisbane should be paved. It is therefore ordered by the Council of the Municipality of Brisbane by virtue of the powers and authorities in them vested by *The Municipal Institutions Act of 1874* and authority of the same as follows:—

1. That the Council may cause a notice to be

served upon any landlord or owner of any shop warehouse dwelling building or ground fronting any street or thoroughfare in the said Municipality to pave the footpath in front of such shop warehouse dwelling building or ground.

2. Every such footpath shall be paved with such materials and in such time and in such manner as shall be directed by such notice as aforesaid and every contractor mason or other person employed in paving any such footpath who shall for such purpose use any inferior or different materials shall for every such offence be liable to a penalty not exceeding ten pounds (£10).

* * * * * * *

4. Every such landlord or owner who neglects or refuses to comply with the notice as aforesaid shall for every such offence be liable to a penalty not exceeding ten pounds (£10).

5. The word "pave" shall include the word "kerb" except when otherwise expressed in any such notice and the words "landlord" or "owner" shall include corporations or companies.

This by-law, No. 23, was made under *The Municipal Institutions Act of 1874*. The sections which refer to this subject are sections 70 & 75, as follows:—

Section 70. "The Council or any municipality may make by-laws for regulating their own proceedings determining the times and modes of collecting and enforcing payment of their rates either in arrear or current generally regulating elections determining the validity of elections when disputed—the preventing and extinguishing fires suppressing nuisances and houses of ill-fame—compelling residents or where there are no residents their owners to keep their premises free from offensive or unwholesome matters—regulating licensing and taxing porters public carriers carters water drawers and public vehicles—regulating the killing of cattle and sale of butchers' meat and the establishment and locality of slaughter-houses or abattoirs — regulating markets market dues fairs and sales—opening new public roads ways and parks—the alignment curbing paving and guttering of streets—the planting and preservation of trees and shrubs—the general control and management of the public reserves—the regulation of weights and measures—the preservation of public decency and public health—the restraining of noisome and offensive trades—and the general good rule and government of the municipality."

Section 75. "The Council shall have the care construction and management of roads public streets bridges ferries wharves jetties and public thoroughfares except as hereinafter excepted and shall also adopt such means as may seem to them desirable for the establishment and management of public cemeteries and public baths and wash-houses the securing of the necessary supply of water for domestic sanitary or irrigation purposes and may make by-laws for carrying out these objects and for lighting and sewerage or other drainage Provided that no municipality shall be compelled to take the charge or management of any new road or street laid down by any private proprietor upon or through his own land which shall not be less than half-a-chain in width unless or until the same shall have been fully made and completed to the satisfaction of the surveyor of the municipality."

The charge on the said information came on for hearing at the Police Court, Brisbane, and was adjudicated on on the 19th day of September, 1879, in Mr. Cribb's absence, after two previous adjudications. The justices fined Mr. Cribb £10, together with 8s. 6d., costs of court, to be recovered in case of default by levy and distress. The order *nisi* for a prohibition was obtained on the following grounds:—Firstly, that there was no statute in force enabling or authorising the said Municipality to pass by-law 23, which was consequently *ultra vires*. Secondly, that the justices had no jurisdiction to make the said order. Now if there was no power to make the by-law, the want of jurisdiction follows.

In approaching an Act of the nature of *The Municipal Institutions Act of 1874*, we have first to consider the rules which are to guide us in its interpretation. There are two classes or bodies to whom powers are given to interfere with the rights of their fellow-subjects. One class is a body in which such interference, although resulting in the benefit of the public generally, yet also results in the benefit of the body itself, such as railway companies, canal companies, insurance companies, and such like bodies. The other class consists of bodies so constituted that the public at large are to be benefited, but the bodies themselves are to derive no benefit—such as boards of health, local management, municipalities, and such like bodies. The laws passed dealing with these two classes are supposed to proceed on different bases. With regard to the first class, the power they get from the legislature may be regarded as the price of what they do for the public, and the Acts enabling them to do certain duties are to be construed strictly against them. They are to do no more than they have strictly bargained for. With regard to the other bodies, however, they have a duty cast upon them by the legislature for the benefit of the public generally, and as they are to derive no benefit from the result of their labors, and as they are acting for the benefit of the public alone, the powers given to them are supposed to be intended to be large enough to enable them to do the most good with them. The intention of the legislature is not to be measured by the more guarded powers given to the first class, consequently where the authority given to them can be construed for the benefit of the public, the statutes giving that authority receive a large construction beneficial to the object sought to be acquired by the party exercising them. Within this last class the present case falls, and we must consider first of all whether it is reasonable that a certain class of people should make a footpath for the benefit of some people who do not contribute towards it. The reason for this may be explained thus: It is a matter of common experience that when a street is formed the property in it receives benefit, each building, each portion of land abutting on that street, is increased in value. The mode of access to the houses along that street is improved and made perfect, and so that neighbourhood acquires increased value to the detriment of the outlying streets. Now, if that street were improved at the expense of the general body of ratepayers, the outlying streets, although reaping no benefit, would have to contribute. Therefore, if the statute requires a liberal construction it may receive it, and in considering these sections they may be construed largely and beneficially to the carrying out the objects of the Corporation. Now the question in this case arises wholly upon the statute. First of all, I take this 70th section which commences "The Council or any municipality may make by-laws for" etc., and in construing that section, I read it as though the word "for" was at the beginning of each of the sentences referring to the different matters below. Thus it would read "for" regulating "for" determining, and so on, down to "for" "the alignment curbing facing and guttering of streets." I see nothing prohibiting the making of such a by-law as this, but I do see on a fair construction of this section, that the words are quite large enough to justify the making of a by-law ordering the owner of property to lay down the pavement in front of his premises. Again, coming to the 75th section, the words "may make by-laws for carrying out these objects" seem large enough to include everything that relates to a street and its construction before and when complete. When you say you live in a street you do not mean you live on the pavement, or on the part which is macadamised. You live in a house adjoining the roadway. Similar sections have been held to bear a construction large enough to refer to the lines and frontages of the houses, and if it goes as far as that, I take it it is large enough to cover everything which goes to the formation of what ultimately forms the common street. If a by-law may be made for regulating the houses, much more in my mind may one be made for regulating

the pavement and ordering the adjoining owners to make that pavement. Again, even if these words do not go far enough, it is very doubtful whether the power given to make by-laws for "the preservation of public decency and public health," would not be sufficient. A pavement keeps the traffic away from the houses, it maintains the space in front of them pure and clean, and this goes a long way towards preserving public health. So that upon all these grounds, I think, there was authority for the Corporation to make this by-law. There is also authority for fixing (see sec. 78) the penalty. In my judgment the conviction was right, and I agree with His Honor Mr. Justice Lutwyche, that the rule should be discharged.

Rule discharged with costs.

Attorney for the plaintiff, *Norris*.

Attorney for the defendants, *Macpherson*.

November 11th, 1879.

HILL *v.* PINNOCK, & OTHERS.

Information—Withdrawal of—Publication of name by limited Company — Penalty — Indictable offence — Informer — Summary jurisdiction — Qui tam action — Nature of withdrawal of action—Costs—27 Vic., No. 4, secs. 40, 41

The omission by a limited Company to paint or affix its name on the outside of its place of business is not an indictable offence.

The action against a limited Company for the penalty for such an omission is like other *qui tam* actions, a civil and not a criminal action, nor does it make any difference that it is commenced by information and tried in a summary way before justices of the peace.

The informer in such a suit has therefore the power to stop the proceedings and all other rights which a suitor has.

The plaintiff had laid an information under the Companies Act of 1868, secs. 40 & 41, against the Brisbane Newspaper Company Limited, for not affixing its name to its place of business. After the information had been heard the case was adjourned to a future day, but before the hearing was resumed, the plaintiff sent a notice to the Company and to the Police Magistrate, that he did not intend to proceed with the matter any further. The Company, however, attended on the day of the adjourned hearing, and the bench adjudged them their costs of attendance.

Pope Cooper obtained a rule *nisi* calling upon the defendants to show cause why prohibition should not issue to prohibit them from proceeding upon the order for the payment of the costs.

Griffith, Q.C. and *Prior*, showed cause against the rule, and cited *Vaughton v. Bradshaw, 9 C.B., N.S., 103; Justices Act, 12 Vic. 43, secs. 14, 18; 9 Geo. IV, 37, Companies Act 1863, secs. 40, 41. Wilkinson's Queensland Magistrate, p. 385; R. v. Stamper, 1 Q.B., 119; R. v. Hardy, 14 Q.B., 529; Tunnicliffe v. Tedd, 5 C.B., 553.*

Pope Cooper, in support of the rule, cited *R. v. Buchanan, 8 Q.B., 535; 29 L.J., M.C., 125; Oke's Synopsis, 274; R. v. Hawkins, 2 D. & R., 209; 8 L.J., N.S. 242. Addison on Torts, 697.*

Lilley, C.J. :—This is a rule to prohibit the magistrates from proceeding on an order for the payment of a certain amount of costs, and the main question — in fact the one question—on which probably our decision must depend, is whether the party suing had power to withdraw the information from the cognisance of the magistrates. Much will depend on the question whether the so-called prosecutor, or rather the informer, was in the position of a civil suitor, or of a party prosecuting for an offence. Looking at the statute itself, I think there can be very little doubt—at all events there is none in my mind—that this was not an indictable offence. It seems to me to be perfectly clear on reading the two sections relating to this matter, that, although they are distinct, the first being not prohibitory but directory, and although they impose a legal duty upon the Company, under the first certainly a party would not be indictable, and under the second it is perfectly clear it is for a mere money penalty which may be recovered before the justices. The 40th section says :—"Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which the business of the office is carried on." In that section there is

no penalty and no punishment. Then comes the 41st section:—"If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act," &c. I think it hardly possible for any lawyer to contend that a direction of an Act of Parliament would be an indictable offence. At all events, that is my view of the matter. Therefore I think the prosecutor was simply in the position of an informer, who might under some old Acts, and possibly under this, have brought a *qui tam* action, if a portion of the penalty had been given to the Crown. Under this statute he has merely a possible interest, but it is an interest for which he might sue; for it may be that the magistrates may order him to have the whole of the penalty for his own use. On the other hand, they may give him nothing. Still he has a possible interest, and one which the statute gives him power to sue for. That the matter is to be brought in a summary way before justices will not alter the nature of the suit, except as to the mode of procedure, as we know very well that many civil matters, rates, and a large number of divers causes of action, are recovered, and directed to be recovered, in a summary way before justices of the peace; and we know very well that this proceeding is brought under the Summary Jurisdiction Act, and not under that relating to indictable offences. It is therefore perfectly clear to my mind that it was a civil proceeding; and really, if the matter had been stronger—if it had been for an indictable offence—there is an old authority that penal actions are simply civil suits. The case of *Atcheson v. Everitt, Cowper 382*, makes it perfectly clear that *qui tam* actions are civil suits, and in no way criminal actions. The case turned upon the question whether a Quaker could give evidence. If it were a criminal case he could not do so. In that case, Lord Mansfield says:—"In cases where an action and an indictment both lie for the same act—as in assault, imprisonment, fraud, &c.—a Quaker is an admissible witness in the action, though not on the indictment;" and the whole case expressly decides that, being a *qui tam* action it was a civil suit and not a criminal proceeding. That being so, the next question is, what right has a civil suitor unless there is something in Jervis' Act expressly to deprive him of the ordinary rights of a plaintiff in a civil action. He has, I think, all the rights a civil suitor has. He has power unquestionably to stop the proceedings. At all events he has the power to stay further costs. I do not say in this case he had power to withdraw the information, but he could arrest further costs. The moment that notice was given to the justices and the newspaper company, the latter incurred further costs at their own peril, and they must pay them. If they will not take notice that the other party is unwilling to proceed, they must incur further costs at their own peril and expense. They may attend, and take the whole bar with them if they like, but that is a luxury which they must pay for, and cannot impose upon the opposite party. In a civil action this would be the proceeding, a writ would be issued—here an information is laid—and a summons issued calling upon the other side to appear. If the plaintiff wishes to stay further costs, he gives notice to the other side that he intends to abandon his action. He cannot take the writ off the file, but he can do what is equivalent—he may make the other side pay the costs if he chooses to appear. Looking at these proceedings—and one must bring one's experience to bear upon it—allowing ten guineas costs seems to be absurd. I have not the slightest doubt the magistrates allowed the costs of counsel appearing that morning. It is absurd to suppose that a small case before the magistrates could have involved ten guineas costs. I myself should be disposed to send the case back to the magistrates for them to correct their decision, for we have that power. Probably, however, it is best for us to express our opinion that the costs were twice what they ought to have been, and to discharge this rule, without costs. If the justices after this expression of opinion from the bench, think fit to issue a distress warrant, they will do so at their peri.

LUTWYCHE, J.:—I am glad to be able to concur in the latter part of the learned Chief Justice's judgment, but regret that I am obliged to differ from him in the expression of his views on the other part of the case. Our difference consists in this. The learned Chief Justice considers that the proceeding in this case was a civil and not a criminal proceeding punishable by fine—"To be fined, imprisoned, or otherwise punished," are the words of the 1st sec. of 11 & 12 Vic. c. 43—but I would rather add here "liable to be punished by a pecuniary fine or penalty." The first question which we have to deal with in approaching this matter is to determine whether it is an offence or not. The 40th section provides that "every limited company under the Act whether limited by shares or by guarantee shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on." Now by that section it seems to me that a duty is imposed upon the company, and although the language of the section being in the affirmative is not so strong as it would be if it were crouched in prohibitory or negative words; still I think they are absolute explicit and peremptory, and show that no discretion is intended to be given, and it seems to me that a duty is imposed upon the company, and that is for the purpose of my judgment sufficient. I need not go into the reasons or the policy which seem to require that this course shall be taken, it is enough that the language of the statute requires the duty to be performed. Then we have the 41st section, that imposes penalties for the breach of the duty required to be performed by the preceding section. The 41st section says: "If any limited company under this Act does not paint or affix, and keep painted and affixed, its name in manner directed by this Act, it shall be liable to a penalty." And it goes further and says, "that for every day during which the name is not so kept painted and affixed, it shall be liable to a like penalty." Then after stating what penalty the company itself shall have to pay, it goes on, "and every director and manager of the company who shall knowingly and wilfully authorise and permit such default shall be liable to the like penalty." I think it is important to point out that, because as it will appear presently a director is liable to imprisonment for non-payment of costs if costs be imposed under the provisions of the 65th and 66th sections of this Act, taken in conjunction with 11 & 12 Vic. c. 43, sec. 18. The Companies Act goes on in the 65th section as follows, "all offences under this Act made punishable by any penalty" which I take it includes the offence under the 40th and 41st sections "may be prosecuted summary before two or more justices in manner directed by an Act 11 & 12 Vic c. 43." Then the 66th section provides for the application of the penalties, which is to be at the discretion of the justices, and there it seems to me arises the necessary divergence between my views on the construction of the statute, and those explained by the learned Chief Justice as his own.

"The justices" says the 66th section "imposing any penalty under this Act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards rewarding the person upon whose information or at whose suit such penalty has been recovered, and subject to such direction all penalties shall be paid into the Treasury, and shall be carried to and form part of the consolidated funds of the colony." In construing that section it seems to me first, that the justices have an absolute discretionary power in the application of the penalty to be inflicted; secondly, that if the penalty is applied solely towards the payment of the proceedings the informer will get nothing, no share of the penalty; and thirdly, that if the justices do not think proper to make any direction as to the application of the penalty then the whole of it shall be paid into the Treasury and "form part of the consolidated revenue of the colony." So that there are contingencies which take the penalty entirely beyond the reach of the informer. He is not in the position of an informer in a *qui tam* action, and the distinction is

this, that as soon as ever the informer files the information in a *qui tam* action he has a vested interest in his share of the penalty, and although the Crown may remit its share, still it cannot oust the informer of the share so become vested. Even an Act of Indemnity will not so deprive the informer of his share of the penalty. I may cite *(Grosset v. Ogilvie, 5 Brown's Parliamentary Cases, 527)*, as an authority for this position. That being so, it seems to me that there is a wide distinction between a person who files an information to recover a penalty in a *qui tam* action, and a person proceeding under the 65th and 66th sections of the Companies Act. In the latter case he has only the possibility of an interest, and when he sues he does not exclude any other person from suing. I take it that in the present case the informer Mr. Hill, having withdrawn, any other person might lay another information and might successfully have prosecuted it. Taking that view it will be seen how very great an engine of oppression such an Act as this might be made if the justices had not the power which they have exercised, and which I think, they rightly exercised—under the 18th section of 11 & 12 Vic c. 43. On turning to that statute it will be seen that the 18th section provides in very clear and plain terms for the manner in which the proceedings shall be conducted before the magistrates. The first section having empowered them to deal with all offences or acts within their jurisdiction—and jurisdiction is given to them by the 65th section of the Companies Act. Then the 18th section provides what shall be done at the day and place appointed by the summons for the hearing in the absence of the defendant. Then it goes on about the middle of the section to provide what shall be done in the absence of the plaintiff, and at the end of the section what shall be the procedure when both parties appear. Now it appears to that the justices where the complainant absents himself have power to dismiss the complaint. If the defendant appears, whether voluntarily or after having been apprehended under a warrant, and the plaintiff does not appear, then under the words of this section they are entitled to dismiss the complaint if they think proper to do so, but if they think proper to adjourn the hearing they are also at liberty to do so. They had the power to dismiss the complaint without hearing it at all; for the 14th section goes on following up the words at the end of the 18th section to define what proceedings shall be taken when both parties appear. I cannot say, therefore, that the justices had departed from the proper line of their jurisdiction when they dismissed the complaint on the application of the defendant's counsel, nor can I say that were wrong in awarding costs to the defendant. Under the 18th section of the Justices Act they had power by their order of dimissal to award and order "that the prosecutor or complaint serpectively shall pay the defendant such costs as to such justice or justices shall seem just and reasonable," and they have exercised that power by awarding ten guineas costs. Here I agree with the learned Chief Justice, I think these costs are excessive, and that if a sum of five guineas were allowed it is quite as much as the merits of the case required. At the same time, I think it of great importance in prosecutions under this Act which may be multiplied exceedingly, looking to the various sections which provide penalties for breaches of duty imposed upon companies and directors that magistrates when they do dismiss cases of this kind should in a moderate and salutary manner impose something like a check upon persons who have really no valid grounds of complaint. It seems to me to be a very great hardship indeed if persons at their discretion are to bring forward and then abandon matters of this kind and so harass companies and the persons engaged in their management to a very serious extent. I do not suppose people in this colony are worst than the people of any other Australian colony, nor have I any reason to suppose that they are any better, and at times of great excitement many things are done which men in their cooler moments may regret. But it is well that the law should step in and impose a check against unreasonable and harassing proceedings by persons who come forward

and lay informations under this Act. Upon the whole I have come to the conclusion that the penalty be reduced to one half, and that the rule be discharged without costs.

HARDING, J. :—This case came on for hearing on the 4th November last, on the motion of Mr. Pope Cooper, to make absolute a rule *nisi* obtained by him as counsel for Charles Lumley Hill, from the Chief Justice on the 24th October, 1879, calling upon the Police Magistrate of Brisbane and certain other magistrates of this colony, and the Brisbane Newspaper Company Limited, to show cause on the first-mentioned day before this Court, why a writ of prohibition should not issue prohibiting further proceedings on a certain judgment or order made by the said magistrates on the 10th October last, in a matter wherein Mr. Hill was complainant, and the said Company were defendants.

The said order of the 10th October was obtained under the following circumstances :—

On the 25th of September, 1879, Charles Lumley Hill laid an information against the Company for the purpose of enforcing the penalties to which it was alleged that the Company had rendered itself liable under the 41st section of The Companies Act of 1863, which, so far as it is necessary for me to refer to it, is as follows :—

"If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed."

The enactment relating to the manner in which the name of the Company was to be painted or affixed referred to in that section, is to be found in the 40th section, which is, so far as it is necessary for me to refer to it, as follows :—

"Every limited company under this Act whether limited by shares or by guarantee shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on in a conspicuous position in letters easily legible."

The mode of recovering such penalty is provided for by the 65th sec., which is as follows :—

"All offences under this Act made punishable by any penalty may be prosecuted summarily before two or more justices in manner directed by an Act 11 & 12 Vic. c. 43, intituled 'An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions within England and Wales with respect to summary convictions and orders,' or any Act amending the same."

The information came on for hearing at the Police Court, Brisbane, on Friday, the 10th October, 1879, before the Police Magistrate and several other justices. Before the hearing—that is to say, on the 7th October—Mr. Hill's solicitor, at an interview with the Police Magistrate, informed him that Mr. Hill desired to withdraw the information, to which the Police Magistrate replied, "He was glad of it." Later in the day of the said 7th October, Mr. Hill's said solicitor handed to the Police Magistrate a letter of that date, addressed to him alone, in which he gave the Police Magistrate notice that he had that day given notice to the Company that Mr. Hill had withdrawn the said information. On reading this letter, the Police Magistrate informed Mr. Hill's said solicitor that the Company might apply for costs. It does not appear that any other magistrates were present at either of these interviews. Mr. Hill's solicitor had at this time, by a letter dated the said 7th October, given the Company notice that the said information had that day been withdrawn, and that he had intimated the same to the said Police Magistrate, and that it would be unnecessary for the Company to appear to answer the summons in the said matter at the Police Court on the Friday then next. The Company gave Mr. Hill no intimation as to how they intended to act in consequence of Mr. Hill's proceedings. On the case being called on before the Police Magistrate and other justices, the Attorney-General appeared for the Company, and, in the presence of Mr. Pope Cooper, stated

that as he was informed that Mr. Hill did not intend to proceed with the information, the Bench could not do less than dismiss the case, with costs. Mr. Cooper then stated that he appeared for the informer or prosecutor to oppose the Attorney-General's application, and replied. The Bench then dismissed the case, and ordered Mr. Hill to pay £10 10s. costs, to be recovered by levy and distress. It appears that on the case being called on the information or charge was not read over, nor was the Company asked how they would plead, and that they did not plead to the charge, as required by the 14th section of the Act 11 & 12 Vic. c 43.

The rule *nisi* for a prohibition was obtained on the ground of want of jurisdiction in the magistrates, because the information had been withdrawn from their cognizance and jurisdiction by written notice to the Company, and by verbal and written notice to the Police Magistrate and by his acquiescence; and because the substance of the information or complaint was not stated to the Company, and they were not asked if they had any cause to show why they should not be convicted.

Under these circumstances, the first question raised for the decision of the Court is:—Was this information of such a nature that it was beyond Mr. Hill's power to withdraw it after it had been laid, without the justices' assent? I say without the justices' assent, as I do not think the facts show any assent. Justices derive their jurisdiction from their commission and certain statutes. Their authority is ministerial or judicial. It is with their judicial authority we have to deal, premising that where the information is laid under their ministerial authority, at all events in respect of criminal charges, the justices have no power to permit the withdrawal of the charge. When the justices act judicially, or, as it is more generally termed, in their summary jurisdiction—that is to say, when they hear and adjudicate upon informations for summary offences or upon complaints for non-payment of money—they proceed under the provisions of the second of Jervis' Acts, 11 & 12 Vic. c. 43. If the charge is not of a public nature, it would seem the parties, with the consent of the justices, may compromise the matter; but should the justices refuse their consent, the parties cannot compromise, as the justices become seized of the complaint by the summons of their jurisdiction [*Reg. v. The Justices of Wiltshire, 8 Law Times, N.S. 42; 2 New Reports, 62, under the name Reg. v. Hawkins*]. In this latter report of this case, intervening on an observation of counsel that the original complaint upon which the summons had been issued was put an end to by a settlement between the parties, Cockburn, C.J., is reported to have said:—"If you are right, then a complainant, when he found a case going against him, might say, 'I don't wish to go on'; and so might deprive the defendant of his certificate of discharge." If, therefore, the parties cannot compromise, that is, with assent of both parties withdraw the matter without the justices' consent, it seems to follow necessarily that one party cannot withdraw the charge without the assent of the other party and of the justices. This view receives further confirmation from the cases of *Bradshaw v. Caughton, 9 C.B., N.S. 103; 30 L.J., C.P. 93: Tunnicliffe v. Tedd, 5 C.B. 553; 17 L.J., M.C. 67*, cited in the argument. I have already found as a fact that the justices did not consent to the withdrawal of the information. So far as I have proceeded, the power to withdraw is only shown to exist when the charge is not of a public nature. When it is of a public nature, it seems that the justices have no power to permit even a compromise, much less a withdrawal of the case by the complainant only. In other words, should I be incorrect in finding that the justices did not consent to the withdrawal of the case, still the first question must be answered in the affirmative, if the enactment contained in the 40th section of the Companies Act of 1863 was of a public nature—that is, for the public benefit generally, and not of a particular person or class of persons. The Companies Act of 1863 introduced into this colony the principle of the incorporation

of companies, with or without limited liability, by registration. It is similar in its provisions to the English Companies Act of 1862, which Act, after reciting that it was expedient to consolidate and amend the laws relating to this subject, repealed such laws, and consolidated and amended their most important provisions; amongst others, sections 7, 8, 26, 27, 41, 42, 65, and 66 of the Companies Act of 1862, presently to be mentioned, will be found to be consolidations of previous enactments. These sections correspond with sections 6, 7, 25, 26, 40, 41, 65, and 66 of the Queensland Act. The law so consolidated and amended is entirely of recent growth, the earliest Act enabling companies to obtain incorporation with limited liability by means of registration having been passed in 1855. Before this, companies, to obtain incorporation with limited liability, had to procure a special charter from the Crown or an Act of Parliament. The new law was an innovation, and in the sections pointed out it carefully provided (see sections 7 and 8) that where the liability of the company was to be limited, the word "limited" should form the last word of the name of every such company, but did not require this (see section 9) where the liability of the company was to be unlimited, and takes special care to keep before the public the fact that the liability of the company is limited; thus showing its policy to be that, where limited liability is given, that fact shall be constantly kept before the public. Such I consider in particular the objects of sections 40 and 41 to be the provision that the name of the company, with the word "limited" as the last word of such name, should be painted and affixed outside its office would be a means of affording to the public generally dealing with the company notice of the limited character of the liability of its members. Now, this does not point to the benefit of any particular person or class of persons, but to the public generally; consequently the enactment contained in the 40th section was, in my opinion, for the public benefit generally, and the first question should, I think, be answered in the affirmative. Another test seems to be that any one may lay an information for this offence. This is usually found to be the case when the enactment is for the public benefit. The first question being then answered in the affirmative, a second question is raised:—Did what took place before the justices amount to a hearing of the information, or justify them in dismissing the case? I am of opinion that the justices were justified in dismissing the case, and that the judgment of the justices must to that extent be upheld. What took place amounted, in my opinion, to a non-appearance by Mr. Hill until the dismissal of the case and the question of costs arose. If this is the true view, the justices were bound under 11 and 12 Vic. c. 43, sec. 18, to dismiss the case. So far, then, I have held that Mr. Hill could not withdraw the case, and that the rule in its present form should be discharged. But notwithstanding that Mr. Hill could not withdraw the case, I do not think that he was bound to continue to prosecute as an active prosecutor. I have shown that he elected not to do so; the consequence is that, from the time he made known such his election, he was only liable to the costs already incurred, and such costs as were absolutely necessary for the dismissal of the case, which would have amounted to nothing had neither party appeared on the hearing. The amount, £10 10s., allowed by the justices in respect of these costs would seem to be extreme. I think that 5 guineas was ample, and that this rule be discharged without costs. At the same time, I do not see the way to interfere with the justices' discretion as to the amount of the costs allowed.

Attorney for the plaintiff, *Bruce.*

Attorneys for the defendant, *Little, Browne, and Rüthning.*

December 2nd, 1879.

SHEAFFE *v.* HUNGERFORD.

Partnership—Breach of agreement for a partnership—Action by one partner against another—Equitable relief.

A and B agreed together to enter into a partnership to form a cattle station; A to provide the grazing country, and B to provide the cattle. After supplying a portion of the cattle, B refused to supply any more. A brought an action against B to recover damages for the breach of the agreement.

Held, that the action, being by one partner against another with reference to partnership matters, and not being for amount, could not be maintained. The Court, however, treated the action as one for the administration of the partnership affairs and for a dissolution, and granted a decree.

THE plaintiff and the defendant made an agreement together to enter into a partnership for the purpose of forming and carrying on a cattle station. Amongst other terms of the agreement, it was provided that the plaintiff should find the grazing country, and that the defendant should supply the cattle to the number of 5,200, to be despatched for the grazing country in mobs of 1000 head at different intervals. After sending two mobs, the defendant declined to send any more, the plaintiff not having paid one-third of the expenses, according to the terms of the agreement. The plaintiff then brought an action against the defendant for damages for his breach of the agreement, and claimed :—

1. That the rights and interests of the parties under the agreement might be defined.

2. £10,000 damages for a breach of the agreement by the defendant in not sending the cattle.

3. A dissolution of the partnership, if any had been created.

The jury before whom the action was tried returned the following findings :—

2. That the contract was not rescinded.

3. That the defendant refused to despatch cattle in accordance with the agreement.

9. That the value of the plaintiff's interest at the time of the refusal was £2,748 13s. 4d.

10. That the value of the plaintiff's interest, if the contract had been performed by putting on the stock, would have been £6,770 6s. 8d.

Griffith, Q.C. (*Pope Cooper* with him), moved for judgment for the plaintiff, in accordance with the verdict.

The *Attorney-General* (*Pring, Q.C., Garrick*, and *Real* with him), opposed the motion.

LILLEY, C.J. :—The plaintiff claims to be entitled to the sum of £4,026 13s. 4d. as damages for the defendant's breach of the partnership articles. His right to have judgment for that amount must depend upon his ability to bring his claim within the class of cases in which formerly one partner could sue another at law independent of account. All the cases cited from *Lindley* in support of the plaintiff's contention were founded on some independent covenant, undertaking, or agreement; on some isolated transaction, or one clearly intended by the parties to be irrespective of the partnership accounts; or on some act to be performed or payment to be made by the defendant before the partnership was formed; or on a breach of an agreement to form a partnership; or on an act of the defendant which has of necessity brought the partnership to an end in a single transaction, and where there can be no question of account. The two cases most strongly relied on are very clearly distinguished from this one. In *Venning v. Leckie* (*13, East 5*) the defendant promised the plaintiff to pay him half of the purchase money of some flax, which was the sole subject of the partnership, *in time for the payment thereof*. It was an independent promise, and it was held that an action lay against the defendant for his moiety of the price which was to be furnished by him in the first instance, although there might be an account to be taken between them as partners on the subsequent disposal of the joint stock. The case of *Gale v. Leckie* (*2 Starkie, 107*) was even more strongly relied upon for the plaintiff. In that case, the defendant agreed to write a book, and the plaintiff to print and publish it. The plaintiff was to take all the risk, and they were to share the profits. The defendant supplied part of the manuscript, which was printed, and then refused to continue the work. The plaintiff recovered the

cost of printing with a sum by way of damages for loss of profits which would probably have been derived from the first edition. The defendant's misconduct or refusal brought the joint undertaking to a sudden end, and there was no question of account. "The action," said Lord Ellenborough, "is not brought against the defendant to recover partnership profits, but for not contributing his labor towards the attainment of profits to be subsequently divided between the parties. I have known similar actions brought in several cases, for instance, actions for not entering into partnership according to an agreement." The case was not treated by the court as one of a partnership actually formed, or if it could be so regarded, then the partnership had been brought to an inevitable end by the defaulting defendant before any matter of account had arisen between the parties. But how does the present case stand? The plaintiff's claim for damages is that "he has been deprived of the profits and emoluments which would have accrued to him from a performance of such part of his agreement, &c." The plaintiff was to furnish grazing lands which he then possessed and others which he had to find within twelve months. The defendant was to send on to those lands 5,200 head of cattle in mobs of 1,000 each at uncertain intervals, depending on conditions over which he had no control. When the first mob reached the country the partnership was formed according to the agreement. The jury have found that the defendant refused, in fact, but not in words, to send more. The partnership has continued since November, 1878, the defendant paying all the expenses of management, although the plaintiff agreed to pay one-third. There is no evidence as to the state of the accounts between the partners at any period. The sum of £4,026 13s. 4d. claimed as damages is the difference between the sum of £2,743 13s. 4d., in the ninth answer found to be the value of the plaintiff's interest in the partnership at the time of the refusal, and the sum of £6,778 6s. 8d., found to be the value of the plaintiff's interest if the contract had been fully performed. The jury have probably calculated these values by taking the sums fixed in the twelfth paragraph of the agreement between the partners as real values, whereas they are expressly stated to be merely for the purpose of "adjusting accounts," and it is only in taking accounts that they can be properly considered. It is clear that upon property of such a fluctuating value as stations and cattle, no absolute value could be placed over a period of five years, which was the term of the partnership. But even if the parties were to be bound by these as actual and not nominal values of the property, it seems to me that the value of the plaintiff's interest in the partnership at either period could not be ascertained without an account of the state of the partnership affairs at the two respective periods referred to. Nor, if these were ascertained do I think that the difference between them would be necessarily the true measure of the plaintiff's damage. It seems to me the relief he is entitled to in this respect is, that he be indemnified against the actual loss which the partnership has sustained by the defendant's refusal to fulfil his agreement. The total loss must be ascertained, and the plaintiff will be entitled to be paid, or to have credit for, or to be indemnified by the defendant, against the proportion of the total loss which he must otherwise have borne, the defendant bearing the whole loss arising from his own breach of contract. The action is substantially for damages, and under the old system the defendant would be entitled to a verdict. But the plaintiff has asked that the suit may be treated as one for the administration of the partnership affairs, and for a dissolution. There are in my opinion sufficient grounds to grant this application, but I need not state them as the defendant does not oppose a decree on this point. It seems to me that an action of this kind should not be set down for trial by jury without applying to the judge. It was never intended by the Judicature Act to put causes which were formerly of purely equitable cognizance within the province of the jury independent of the opinion of the judge as to the expediency of

such a course. But under the Judicature Act, I can mould the pleadings and grant the relief to which the plaintiff is really entitled. The decree will therefore contain declarations and direct enquiries in accordance with this judgment, and will treat the findings of the jury in the plaintiff's favor except as to the money amounts and damages, and matters of account, as if they had been determined on issues of fact directed by the judge to be tried by a jury. An account must be taken of all partnership dealings and transactions between plaintiff and defendant of the credits, property, and effects, belonging to the partnership at the date of decree, from which time the partnership will be dissolved. A sale of the partnership property will be made with the approbation of the judge. As to incumbrancers, free from the incumbrances of those who consent, and subject to the incumbrances of those who do not. The manager of the partners, Mr. Chapman, in the meantime to be receiver. All questions of costs reserved. Further consideration and leave to apply.

Attorney for the plaintiff, *Bruce*.

Attorneys for the defendant, *Murphy and Paterson*.

December 9th, 1879.

SIEVERS *v.* M'AULEY.

Discovery of gold—Reward for—Measurement of distance—38 Vict., No. 11, Regulations No. 44, 6, 9.

The measurement of distance referred to in Regulation No. 44* of the *Gold Fields Regulations of 1874*, is horizontal plane measurement.

Semble: Regulations Nos. 6 and 9† do not apply to reward claims, but only to holders of ordinary claims marked off by themselves.

APPEAL, under section 74 of the *Gold Fields Act of 1874*, from an order of the Northern District Court held at Cooktown, made on July 26, 1879. The case came before the District Court by way of appeal from the decision of the Warden's Court, held at Maytown, in the matter of a complaint wherein the present appellant (Seivers) complained that the respondents (the M'Auleys) being the holders of the Alexander prospecting claim, on the Palmer goldfield, obtained and held 100ft. on the line of the Alexander reef in excess of the ground tenable by them under the 44th clause of the General Regulations proclaimed on December 29, 1874, under the Goldfields Act. At the hearing of the complaint, it was adjudged by the Warden's Court that the respondents, who were the first discoverers of gold in apparently payable quantities in the Alexander reef, and to whom the prospect claim had been allotted, with a total length of 400ft., as the discoverers of a new reef, had obtained registration for 100ft. on the Alexander reef in excess of the award claim; and it was ordered that the said Alexander prospect claim should be reduced to 300ft. on the line of reef. The 44th regulation, under which this case arose, provides that "the reward claim which shall be given for the discovery of gold in apparently payable quantities on any new reef . . . . shall be in proportion to the distance from any reef being worked," according to a scale annexed; if the new reef be distant more than two miles and less than ten miles from another reef, 300ft. to be allowed along the line of reef, in addition to the

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* 44. The reward claim which shall be given for the discovery of gold in apparently payable quantities on any new reef, or the rediscovery of the same or any reef previously occupied and abandoned, shall be in proportion to the distance from any reef being worked, and as follows:—

If distance less than 400 yards	..	100	feet	along	the line of reef.
„ more than 400 yards and less than 1 mile	..	150	„	„	„
„ more than one mile and less than two	..	200	„	„	„
„ more than two miles and less than ten	..	300	„	„	„
„ ten miles or more	..	500	„	„	„

With a width of 400 feet. The above reward shall be in addition to the number of claims the party would be otherwise entitled to as ordinary miners, in ordinary quartz claims.

† 6. Any party of miners may take possession of a claim (except where otherwise specially provided) by fixing firmly in the ground at each corner of the claim a peg or post, projecting at least two feet above the surface, and set in L trenches, three feet long and six inches deep along each boundary line, provided that no other miner or miners is or are then in possession or occupation thereof. In the event of any other miner or miners being in possession of the claim, the party desiring to take possession shall apply to the Warden to inquire into the matter, and in case any miner shall take forcible possession of, or commence to work in any claim after his right to take possession thereof has been disputed, he shall forfeit all right and title which he may have acquired therein.

9. Any miner marking off more ground than he is entitled to shall be liable to have the surplus ground pegged off at either end of the claim at the option of any other miner.

ordinary 50ft. each which ordinary miners are entitled to. Upon the hearing before the District Court of the appeal from the Warden's Court, appellant (Sievers) contended that under the 44th regulation the distance from a reef being worked should be measured upon a horizontal plane, and gave evidence to prove that the distance from the Alexander reef and another reef then in actual working was, if so measured, less than two miles. It was admitted that the distance, if measured along the surface of the ground exceeded two miles. The learned Judge being of opinion that the proper mode of measurement was along the surface, and that the distance was consequently more than two miles within the meaning of the 44th regulation, reversed the decision of the Warden's Court, and allowed the appeal. The question now for the decision of the Full Court was whether the Judge of the District Court was right or not—or, in other words, whether the word "distance" in the 44th regulation was to be construed as referring to measurement along the natural surface of the land or upon a horizontal plane.

The *Attorney-General (R. Pring, Q.C., Garrick* with him), for the appellant; *Griffith, Q.C. (Rutledge* with him), for the respondents.

Lilley, C.J.:—This is an appeal from the decision of the deputy of the Northern District Court Judge, reversing that of the Warden's Court at Maytown, on the construction of the 44th of the Regulations of September 29, 1874. That regulation provides that "the reward claim which shall be given for the discovery of gold in apparently payable quantities on any new reef, &c., shall be in proportion to the distance from any reef being worked, and as follows:—If more than one mile and less than two, 200 feet along the line of reef. If more than two miles and less than three, 300 feet along the line of reef, &c." The appellant Sievers complained in the Warden's Court that the respondents M'Auley had obtained 100 feet in excess, their claim being as he alleged less than two miles from a claim being worked, and the Warden's Court reduced the claim. The Warden's Court held that the distance between the two claims must be measured upon a horizontal plane. The Deputy Judge on the appeal held that the distance must be measured on the surface of the ground, not upon a horizontal plane, and reversed the Warden's decision. The question is whether the learned judge was right. There can be no doubt about the rule of English law on this question at the present moment. Where distance is mentioned in any statute or contract, it is to be measured by a straight line upon a horizontal plane from point to point, unless there be something in the contract or statute against such construction, and requiring a different rule of measurement. There are four possible modes of measuring the distance: on the horizontal plane; by a string or chain over the surface; by some road, path, or track; or by the nearest practicable mode of access. Many ingenious difficulties have been suggested as being in the way of any one of these methods of measurements being adopted. We think the scientific rule of measurement is the true rule, unless there is something in our local legislation to displace it. It is certain and practically of universal application, whilst any other rule is subject to burdensome uncertainty of proof and application. By our "Acts Shortening Act of 1867," by which certain arbitary rules of construction are enacted, it is provided that "distance of space mentioned or indicated in an Act shall be computed according to the nearest road ordinarily used in travelling, unless measurement in a direct line be expressed or that construction be rendered necessary by the context." We think that regulations made in pursuance of the statute, and having the force of the law, must receive the same interpretation, unless it be excluded by express terms. There are only two ways of measurement mentioned in this statute, by the road or in a direct line, which we hold to be on the horizontal plane. It is conceded that in this case there is no question of road measurement. The claim is in a part of the country

probably never crossed by the foot of civilized man. No road ordinarily used exists to give the rule of measurement. If, then, we regarded merely the circumstances of this case, we must adopt the "direct line" or horizontal plane as the necessary line. When, however, we look at all these regulations, before and after No. 44, and regard them, as we reasonably may, as context to the disputed regulation, it seems to us that the numerous and varied measurements required can only be made throughout the length and breadth of the goldfield, with safety and convenience, upon the scientific rule. We think this may be considered the necessary construction. Measurement upon the surface is excluded alike by the English authorities and our own statute. We think, therefore, that the appeal must be allowed on this point. But another and very important question arises on this case, and has been argued before us. It was not raised before the learned deputy Judge at the time of hearing the appeal, and we need not deal with it. However, as it has been argued, and as we have been asked to give our opinion, and as a decision upon it may have important consequences and save much waste in future litigation, we will, although it is not necessary for the immediate purpose of this appeal, give our opinion. It is not disputed that the original proceeding in the Warden's Court was taken under regulation 6, which enables any party desiring to take possession of a claim to apply to the Warden to inquire into the matter where any other miner is in possession of the claim. The foundation of the proceeding is regulation 9, which provides that "any miner marking off more ground than he is entitled to shall be liable to have the surplus ground pegged off at either end of the claim, at the option of any other miner." We think these regulations 6 and 9 do not apply to the holder of a reward claim, but in express terms only to holders of ordinary claims marked off by themselves. The title to a reward claim depends on regulation 44, which requires—after the finding of gold in apparently payable quantities by the holder of a protection area—that the Warden shall proceed to the ground, and if sufficient gold has been found to warrant it, that he shall allot the prospectors a reward claim in addition to the ordinary number of claims to which they would otherwise be entitled. We have thus a reward given by the Crown for a valuable consideration, namely, the discovery of gold. If the officer of the Crown should, either corruptly or otherwise, give an excessive award, the excess would be recoverable at the instance of the Crown in a proper proceeding. But we see nothing in the statute of the regulations to warrant a summary ejection of the prospector at the instance of a person who has no title to the ground. Has a person, then, who is only the holder of a miner's right a title to disturb the possession of another who has received this gift or reward from the Crown? The holder of a miner's right under section 9 of the Act is entitled (except as against her Majesty) to take possession of, mine, and occupy Crown lands for mining purposes. We think the exception is important, added to the fact that the regulations contain no provision for dispossessing the holder of the reward claim in such a case as this. He may defend his possession on the title derived from the Crown, which is good against all the world. The holder of the miner's right has no title nor *locus standi* as an actor in any proceeding to oust him. We can easily understand why the reward claim should stand in an exceptional and more favourable position in this respect than an ordinary claim. In the former gold has been prospected for and discovered, but the ordinary claim may contain no gold. It is only the gold which is the miner's property. In the one instance we have the disturbance and dispossession of a valuable property allotted by the officer of the Crown, in the other the claim has been marked off by the miner himself. Security of tenure in such a case might well have been considered of more importance than an allotment of 100 feet in excess of the authorised quantity. If we could decide the appeal upon this point, the respondent must succeed. Our power is, however, limited to a decision of the

question of law raised on the hearing below and submitted to us by the Judge. It must, therefore, be decided on the question of measurement, and as we are in favour of the appellant on that point, the appeal will be allowed and the case will go back to the Northern District Court for further hearing. We give no costs.

Attorneys for the appellant, *Daly & Hellicar.*

Attorneys for the respondents, *Wilson & Wilson.*

9th December, 1876.

In Re THE REAL PROPERTY ACT OF 1861, AND PORTION No. 1, ON NERANG CREEK, CERTIFICATE OF TITLE 49542.

Grant of land—Description in premises—25 Victoria, No. 14, sec. 14.

In a grant of land the land granted was described as "All that piece of or parcel of land . . containing by admeasurement 1,280 acres exclusive of swamp be the same more or less situated &c."

Held, that the grant included the swamp. Section 14 of the *Real Property Act of 1861*, does not empower the Registrar-General to consult the Supreme Court on matters of administrative detail involving no question of law.

SPECIAL CASE.

1. By Deed of Grant No. 11,338, dated the 10th day of May, 1865, expressed to be made in conformity with the regulations dated the 1st day of August, 1861, for the encouragement of the cultivation of cotton, Her Majesty granted unto Thomas Bazley and others, their heirs and assigns, as tenants in common, a piece or parcel of land in the colony of Queensland, described in the said grant in the words following that is to say:—"All that piece or parcel of land in our said territory of Queensland containing by admeasurement one thousand two hundred and eighty acres exclusive of swamp be the same more or less situated in the County of Ward parish of ——Portion One exclusive of a reserved road one chain wide from Brisbane to the Tweed River and a reserved road one chain wide used by timber cutters passing through this land in an easterly south-easterly and north-easterly direction the areas of which have been deducted from the total area."

2. The Corporation of the Bank of New South Wales, subsequently became entitled to the land comprised in the said deed of grant for an estate in fee simple, and were duly registered as proprietors thereof for such estate under the provisions of the *Real Property Act of 1861*, and on or about the 8th day of September, 1878, a certificate of title No. 49,542, Vol. 333, Fol. 32, for the said land was duly issued to the said bank, and the said bank are now the registered proprietors thereof.

3. The description of the said land in the said certificate of title is in the same words as the description thereof in the said deed of grant, except that in the said certificate of title, the words "exclusive of a swamp" are substituted for the words "exclusive of swamp" in the said grant, and are enclosed with marks of parenthesis.

4. The total area of the land included within the external boundaries set forth in the said deed of grant and certificate of title, exceed 1,280 acres. A great part of such land consists of swamp, which in the said instruments is respectively described as "swamp" or "a swamp," and which at the date of the said deed of grant had not been separately surveyed or distinguished from the remainder of the land included within the said external boundaries.

5. On or about the 3rd day of July, 1879, the said Bank of New South Wales caused to be lodged for registration in the Registrar-General's office a transfer of a portion of the said land containing 46 acres 32 perches, which portion includes a part of the said swampy land.

6. On the 4th day of August, 1879, the said Bank caused to be lodged in the Registrar-General's office a request by the said Bank of New South Wales for a certificate of title to be issued to them for the remainder of the land comprised in the said certificate of title, No. 49,542, which remainder is therein stated to be 1,744 acres 1 rood and 38 perches, such area includes the whole of the remaining portions of the land comprised in the said certificate or title.

7. With the said transfer the said Bank caused to be lodged in the Registrar-General's office a map or plan of the said land duly verified by a

licensed surveyor, in accordance with the provisions of the *Real Property Act of 1861*. Such map or plan distinguished the portions of the land included within the external boundaries in the said certificate of title which consisted of swamp, and showed that the total area included within such boundaries exceeded 1,280 acres.

8. Questions of law have arisen upon the several matters, and by an order of His Honor Mr. Justice Harding, made on the twenty-ninth day of November, 1879, it was ordered that the said questions should be stated by the said Registrar-General and Master of Titles in a special case for the opinion of this Honorable Court.

The questions submitted for the opinion of this Honorable Court, are :—

1. Whether the said Bank are the registered proprietors of the whole of the land comprised within the external boundaries described in the said certificate of title including the swamp land comprised within such boundaries ?
2. Whether the Registrar-General ought to register the said transfer and to comply with the said request ?
3. If the Registrar-General ought to comply with the said request and to issue a certificate of title for the remainder of the said land, how should the area of such remainder be stated in such certificate ?

The *Attorney-General* (*Miller* with him), appeared for the Registrar-General ; *Griffith*, *Q.C.*, (*Rutledge* with him), for the Bank of New South Wales.

Lilley, C.J. :—The Registrar-General under the power given by section 14 of the *Real Property Act of 1861*, has submitted certain questions for the opinion of the court. So far as they are questions of law it is the duty of the court to answer them on the assumption that the facts stated by the Registrar-General are accurately set out. But so far as the questions seek our opinion as to what line of conduct he ought to pursue on matters of administrative detail consequent on any opinion we may give, it is not our duty to answer him. The first question submitted to us is : Whether the Bank are the registered proprietors of the whole of the land comprised within the external boundaries described in the certificate of title including the swamp land comprised within such boundaries ? The Bank has appeared by counsel with the consent of the Registrar-General, but Mr. Griffith, who appeared for them declined to admit or debate any matter antecedent to the certificate of title. It would be idle for us to give any opinion upon the circumstances connected with the original grant from the Crown. In this proceeding none of the parties are bound to submit to our judgment. They may, notwithstanding anything we may say, contest their rights in a regular suit. Even those who have volunteered to come before us are in no wise bound, and, indeed, refuse to submit. The Crown, who may possibly be interested, is not represented, the Attorney-General who appeared for the Registrar-General, having expressly stated that he did not appear for the Crown. The Bank do not admit the facts alleged with respect to their title before the certificate was issued. Under these circumstances it would be worse than useless on our part to give any opinion upon them. This mode of obtaining the opinion of the court is in truth gravely objectionable, and should never be resorted to where the facts are disputed. We might prejudice the rights of the parties, and certainly no practical advantage could follow from our judgment. We think, therefore, we shall best discharge our duty by dealing with the first question as depending on a dry construction of the language of the certificate of title. A copy of the instrument has been put in evidence by the consent of the parties who are before us. "All that piece of land situated in the County of Ward, parish of —— being portion one containing by admeasurement one thousand two hundred and eighty acres (exclusive of a swamp) more or less commencing on the right bank of Nerang River at the north-west corner of portion eleven and bounded thence on the east by a line bearing south one hundred and twenty-nine chains and seventy-three links on the south by a line bear

ing west one hundred and fifty-nine chains and seventy-four links on the south-west by a line bearing north 45° west seventy-three chains and and thirty links on the west by a line bearing north eighty chains eighty-four links to Nerang River and on all other sides by that river downwards to the point of commencement. Exclusive of a reserved road one chain wide from Brisbane to the Tweed River and a reserved road one chain wide used by timber cutters passing through this land in an easterly south-easterly and north-easterly direction the areas of which have been deducted from the total area which said piece of land is the whole of the portion marked one, delineated in the public map of the said county &c. &c." No technical rule will aid us. It seems to be a mere question of grammatical construction —in other words, of plain English. The land is described by certain lines or metes and bounds, and out of it is 'reserved' two roads, their bearings and widths being given, with this statement added that 'the areas of which [roads] have been deducted from the total area.' The supposed difficulty of construction arises upon the introductory words of the description of the land, as 'all that piece or parcel of land containing by admeasurement 1,280 acres exclusive of swamp.' It is supposed that these words exclude the swamp from the total area of the land. There are no words of reservation here; how much of the land was swamp or dry land does not appear, and there is no statement that the swamp had been deducted from the total area. The words *exclusive of swamp* appear to be merely descriptive — namely, 'the land contains 1,280 acres, not reckoning the swampy ground.' Looking at the whole of the description of the land in the certificate, it seems clear that it includes all within the external boundaries, except the reserved roads. Both the dry land and the swamp are within those bounds. The best way is to adhere to so much of the language as is certain. If that leaves a clear and complete description we need go no further. It seems to us that all the land within the well-defined external boundary lines described as Portion 1, except the reserved roads, is included in the certificate of title—the description concluding with these words, *being the whole of portion 1, &c.* The map on the certificate does not show any swamp, but it does set out the reserved roads. Our answer, therefore, is to question 1, yes. The second and third questions are within the kind which it is no part of our duty to answer, and we give no reply to them.

Attorneys for the Bank of New South Wales, *Hart & Flower.*